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High Court

1954

Volume II

JULY—DECEMBER

JUDGES OF THE HIGH COURT OF JUDICATURE AT ALLAHABAD

1954

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1954

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ERRATA

At Page 484—*Read Full Bench* (*Civil Miscellaneous*) *instead* of FULL BENCH (APPELLATE CIVIL) in the Head Notes

At page 591—*Read Full Bench* (*Criminal Miscellaneous*) *instead* of FULL BENCH (APPELLATE CIVIL) in the Head Notes

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CIVIL REVISION

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CHIEF INSPECTOR OF FACTORIES, U P
(APPLICANT)

v

V K MODI (OPPOSITE PARTY)

1952
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Payment of Wages Act, 1936, *ss* 15 17—*Delay in payment of wages—Wages paid before application by Inspector of Factories—Magistrate cannot order compensation—Total sum in dispute above Rs* 300—*Appeal is competent*

Under s 15 of the Payment of Wages Act a magistrate can not order compensation to be paid by an opposite party if the wages were paid before making an application by the Chief Inspector of Factories

In order to make an order of a magistrate appealable under s 17 of the said Act all that is necessary is that the total sum ordered to be paid should exceed Rs 300 It may be composed of wages alone or of compensation alone or of wages and compensation both

Chunnan Lal v Junior Inspector of Factories (1) distinguished

Civil Revision no 195 of 1952 from an order of H P Asthana District Judge of Banaras (as he then was) dated the 5th September 1951

Standing Counsel *Jagdish Swarup* for the applicant

(1) I L R [1942] Bom 649

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CHIEF INSPECTOR OF FACTORIES U P v V K MODI

DESAI, J — This is an application by the Chief Inspector of Factories for revision of an order passed by the District Judge in a case under the Payment of Wages Act In this case it is conceded that the wages of employees were to be paid by the opposite party before the 10th of the month Actually they were paid after the 10th of the month but before an application was made by the Chief Inspector under section 15 of the Payment of Wages Act Consequently on the application of the Chief Inspector under section 15 the Magistrate ordered compensation to be paid by the opposite party and the amount ordered exceeded Rs 300 The opposite party went up in appeal and the learned District Judge held that the Magistrate had no jurisdiction to order compensation when the amount of the wages had already been paid before the application was made He set aside the order of the Magistrate

The view taken by the learned District Judge that when the wages had been paid before the Chief Inspector made the application the Magistrate could not order compensation to be paid by the opposite party is correct An application under section 15 has to be made before the delayed wages are paid This necessarily follows from the directions that can be made by the Magistrate The principal direction that has to be made is that the delayed wages should be paid The payment of compensation is an incidental direction If the wages have been paid (even though after the due date) it is impossible for the Magistrate to direct payment of the (delayed) wages and if he cannot make that direction it follows that he cannot make any direction about the payment of compensation The language of section 15 makes it clear that an order of payment

of compensation alone is beyond the jurisdiction of a magistrate If compensation can be ordered to be paid it can be ordered to be paid only along with the wages If no wages are ordered to be paid no compensation also can be ordered to be paid

It is contended in this application that the learned District Judge had no jurisdiction to entertain the appeal if the Magistrate had no jurisdiction to pass the order of compensation The Magistrate purported to act under section 15 The amount of compensation ordered by him exceeded Rs 300 Under section 17 an appeal lies if the total sum directed to be paid by way of wages and compensation exceeds Rs 300 In this case the total sum directed to be paid exceeded Rs 300 though it was composed entirely of compensation But there is nothing in section 17 to suggest that before an order can be appealable both wages and compensation should be ordered to be paid All that is necessary is that the total sum ordered to be paid should exceed Rs 300 It may be composed of wages alone or of wages and compensation both A magistrate is not bound to award compensation even when he directs payment of delayed wages He has discretion not to order any compensation while directing payment of delayed wages Just as the amount ordered in order to make the order appealable may consist entirely of wages so also it may consist entirely of compensation for the purposes of section 17 That such an order is illegal is besides the question There is nothing in *Chimman Lal v Junior Inspector of Factories* (1) which conflicts with the view taken above DIVATIA, J laid down in that case that a magistrate cannot award compensation if the delayed wages have already been paid before the order In that case the delayed wages had been paid before the order was made by the Magistrate and the

(1) I L R [1952] Bom 649

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CHIEF INSPECTOR OF FACTORIES U P v K MOHAN DASAI J

Magistrate ordered compensation of less than Rs 300 Still there was an appeal by the employer who contended that the amount of the wages that had been delayed in payment and the amount of compensation taken together exceeded Rs 300 and that consequently he had a right of appeal That contention was overruled That case is distinguishable from the present case where the amount of compensation itself exceeded Rs 300 DIVARIA, J relied upon the fact that the compensation awarded in that case did not exceed Rs 300 I therefore hold that the appeal was competent and that the learned District Judge did not act without jurisdiction in entertaining it

There is no force in this application in revision and it is dismissed

Revision dismissed

CIVIL MISCELLANEOUS

Before the Honourable B Malik Chief Justice and Mr Justice Bhargava

P STANWILL AND COMPANY (APPLICANT),

v

THE COMMISSIONER OF INCOME TAX (OPPOSITE PARTY)

1952 *August 26*

Excess Profits Tax Act' 1940, *s 2(5)—Partnership firm working efficiently as auctioneers—One of the partners a qualified engineer—Income of firm—Whether depended mainly on personal qualifications of partner —Skill and knowledge if necessary in every business*

The assessee P was an old partnership firm and the partners work as auctioneers in the city of K The partners had acquired considerable experience and one of them was a qualified

engineer which enabled him to carry on the business more efficiently than others They attracted a lot of Government work and out of the profits of Rs 94 284 the income made by sale of Government properties was Rs 70 303 They had done much better than several other firms of auctioneers and the income in their business was not due to war conditions

Upon question referred

Held that the income of P depended mainly on the personal qualifications of the partners as contemplated by s 2(5) of the Excess Profits Tax Act and the Tribunal erred in deciding the point not on the facts of the case but upon the view it took that in India no special qualifications were needed to set oneself up as an auctioneer

Held further that a certain amount of skill and knowledge is required in every business in a profession it is required in a larger degree though that may not be the sole criterion for judging whether a particular business is a profession or not

Case law discussed

Miscellaneous Case no 320 of 1947

The facts appear in the judgment

G S Pathak for the applicant

Jagdish Swarup for the opposite party

The judgment of the Court was delivered by—

MALIK, C J —This is a reference under section 21 of the Excess Profits Tax Act read with section 66(1) of the Indian Income Tax Act The assessee firm Messrs P Stanwill & Co is a partnership firm and the partners work as auctioneers in the city of Kanpur During the chargeable accounting period 1943 44 the assessee s income from this business amounted to Rs 94 284 The Excess Profits Tax Officer considered that excess profits tax was leviable on the profits of the business made during the accounting period The assessee on the other hand challenged their liability on the ground that they were carrying on a profession and the profits depended mainly upon their personal

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qualifications. A suggestion was also made on behalf of the department that the profession consisted wholly or mainly in the making of contracts on behalf of other persons. There were thus three points raised: firstly whether the assessee carried on a profession; secondly whether in that case the profits depended mainly on their personal qualifications; and lastly whether the profession consisted wholly or mainly in the making of contracts on behalf of other persons.

The first and the third points were decided in favour of the assessee. The second point was decided against the assessee. The assessee alone asked for a reference to this Court.

The assessee formulated the question as follows:

> Whether in the circumstances of the case the activity of auctioneers conducted as profession did not depend wholly or mainly on the personal qualifications of the partners?

The Tribunal, however, changed the form of the question and the question referred to us is in these terms:

> Whether in the circumstances of the case the income of the applicant derived from their activity of auctioneers profession depends wholly or mainly on the personal qualifications of the partners of their firm as contemplated by section 2(5)?

Learned counsel for the assessee has urged that the Tribunal in deciding the question whether the income of the assessee depended mainly on the personal qualifications of the partners of the assessee firm has not based its finding on the facts found by it in its appellate order but has decided the question on the general but irrelevant consideration that in India auctioneering is not a profession which required any particular qualification and there being no law requiring a person to take

out a licence any one may set himself up as an auctioneer

The relevant portion of section 2(5) of the Excess Profits Tax Act provides that—

> unless there is anything repugnant in the subject or context—
>
> * * * *
>
> business includes any trade commerce or manufacture or any adventure in the nature of trade commerce or manufacture or any profession or vocation but does not include a profession carried on by an individual or by individuals in partnership if the profits of the profession depend wholly or mainly on his or their personal qualifications unless such profession consists wholly or mainly in the making of contracts on behalf of other persons or the giving to other persons of advice of a commercial nature in connexion with the making of contracts

The reason for exempting from payment of Excess Profits Tax the profits made which depend wholly or mainly on the personal qualifications of the person making the profit is obvious The primary object of the Excess Profits Tax Act was to deal with increased profits made due to war conditions If however the profits did not depend upon the war conditions but depended mainly on the personal qualifications of the person making it there was no reason why it should be subjected to Excess Profits Tax

As we have already said the Tribunal has held that the business of an auctioneer is a profession As the question whether the assessee was carrying on a profession was not referred to us it is not necessary to go at any length into that question but it may be pointed

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MEHTA J.

out that the main difference between ordinary commercial business and profession lies in the amount of knowledge or skill employed in carrying it on though that may not be the sole criterion. As was pointed out by ROWLATT, J. in *Christopher Barker and Sons v. Inland Revenue Commissioners* (1)

> every business man has to use skill and ability in the conduct of his business and therefore those qualities are not distinguishing marks of a profession.

The learned Judge in attempting to point out the difference says—

> All professions are businesses but all businesses are not professions and it is only some businesses which are taken out of the operation of the section namely those are professions the profits of which are dependent mainly upon personal qualifications and in which no capital expenditure is required or only capital expenditure of a comparatively small amount.

In *William Esplen, Son & Swanston Limited v. Commissioners of Inland Revenue* (2) the same learned Judge again said—

> it is of the essence of a profession that the profits should be dependent mainly upon the personal qualifications of the person by whom it is carried on."

SCRUTTON, L. J. in *The Commissioners of Inland Revenue v. Maxse* (3) attempted though with considerable diffidence to define what is a profession and said

> I am very reluctant finally to propound a comprehensive definition. A set of facts not present

(1) L.R. [1919] 2 K.B. 222. (2) L.R. [1919] 2 K.B. 781.
(3) 12 Tax Cases 41.

to the mind of the judicial propounder and not raised in the case before him may immediately arise to confound his proposition. But it seems to me as at present advised that a profession in the present use of language involves the idea of an occupation requiring either purely intellectual skill or if any manual skill as in painting and sculpture or surgery skill controlled by the intellectual skill of the operator as distinguished from an occupation which is substantially the production or sale or arrangements for the production or sale of commodities. The line of demarcation may vary from time to time. The word profession used to be confined to the three learned professions—the Church, Medicine and Law. It has now I think a wider meaning.

In *Currie v. Commissioners of Inland Revenue* (1) Lord STERNDALE M.R. pointed out that whether a man was carrying on a profession or a business depended upon the circumstances of the case and there might be circumstances in which nobody could arrive at any other conclusion than that what the man was doing was carrying on a profession and therefore looking at the matter from the point of view of a Judge directing a jury the Judge would be bound to direct them that on the facts they could only find that he was carrying on a profession. That reduces it to a question of law. On the other hand there might be facts on which the direction would have to be given the other way. But between those two extremes there was a very large tract of country in which the matter became a question of degree and where that was the case the question was undoubtedly in his opinion one of fact and if the Commissioners came to a conclusion of fact

(1) (1921) 2 K.B. 332

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without having applied any wrong principle then their decision was final upon the matter.

That view was followed by the Court of Appeal in *Carr v. Inland Revenue Commissioners* (1).

From an examination of these decisions it follows that a certain amount of skill and knowledge is required in every business, in a profession it is required in a larger degree though that may not be the sole criterion for judging whether a particular business is a profession or not.

It is urged that an auctioneer's business requires special skill and the personal factor goes a long way to make it a success and reliance is placed on Halsbury's Laws of England, Second Edition, Volume I, page 695, where it is said:—

> The licence is of a personal character and every member of a firm of auctioneers who exercises or carries on the trade or business of an auctioneer or acts as such must take out a separate and distinct licence.

And again at page 697 where it is said that:

> The agency of the auctioneer is personal and cannot be delegated.

At page 705 of the same book it is pointed out that an auctioneer is held liable for negligence and at page 717 the passage is as follows:

> An auctioneer being a person who professes to carry on a business requiring skill and knowledge must display such skill and knowledge in acting for his vendor as is reasonably to be expected from competent auctioneers and must follow the course of business ordinarily recognized by custom or prescribed by statute.

(1) L. R. [1922] 2 K. B. 118

There can therefore, be no doubt that an auctioneer's business is recognized in England as a business requiring personal skill to be carried on by the person who has been engaged for the purpose by his customer and a personal licence has to be taken out by every member of the firm of auctioneers before they can work as such The Tribunal has relied on the fact that in India no licence is needed for the work of an auctioneer It is urged in reply that to practise any of the indigenous systems of medicine or even homoeopathy it is not necessary to be a registered practitioner in India and yet it cannot be urged that the work of a Kaviraj or Hakim or that of a doctor practising homoeopathy is not a profession Learned counsel has therefore pointed out that the mere fact that there is no statutory provision yet setting out the requirements for carrying on the business of an auctioneer does not make it any the less a business requiring skill and knowledge

The question whether the profits in the case before us mainly depended upon the personal qualifications of the partners of the assessee firm would depend upon the facts and circumstances of the case The point was raised before the Appellate Tribunal and the circumstances were clearly set out on behalf of the assessee why the assessee claimed that the profits were mainly due to the personal qualifications of the partners The facts and circumstances relied on by the assessee were that the assessee firm was an old firm and the partners thereof had acquired considerable experience in this line that one of them was a qualified engineer which enabled him to do the work of valuing the property and carrying on the business more efficiently than it could be carried on by any person not so qualified that by reason of the efficient manner in which they were able to discharge their duties they had attracted a lot of government work and out of the total profits amounting to

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Rs. 94,284, Rs. 70,503 were derived from income made by sale of government properties and lastly that though there were several firms of auctioneers in Kanpur they had done much better than other firms which must be due to their personal qualifications. As against this it is pointed out that there is nothing on behalf of the department to show that there was any increase in business or income due to war conditions.

The facts and circumstances relied on by the assessee do not seem to have been challenged before the Tribunal except that while the assessee claimed that the business had been carried on for two generations, on behalf of the department it was admitted that from the assessment records available it was clear that the firm had been assessed to income-tax at least since 1929-30.

The Tribunal however decided the point against the assessee not on the facts of this particular case but in the view that it took that in India no special qualifications were needed to set oneself up as an auctioneer.

Sri *Jagdish Swarup* on behalf of the department has relied on the seventh paragraph of the appellate order of the Tribunal in which the Tribunal held that though in a sense they were exercising a profession but it was not one the income of which depended on personal qualifications of its partners. This finding was however not recorded as would be apparent from the previous two paragraphs of the appellate order on the facts and circumstances of the particular case but on the reasoning that in India anybody can set himself up as an auctioneer and he need not possess any qualification to be able to carry on that business.

When the application under section 21 of the Excess Profits Tax Act was heard by the Tribunal an objection was raised on behalf of the department that the case did not raise a question of law but a question of fact and

the Tribunal took the view that the point raised was a question of law as the point was not decided on the facts of the particular case but on the general view that no special qualifications being required for setting up the business of an auctioneer the assessee could not claim that the main part of their income depended on their personal qualifications

The income of an auctioneer depends mainly on the amount of business that the firm can attract, the price at which it succeeds in selling the goods and the rate at which commission is payable on the sale proceeds All these are factors requiring or depending on personal skill and *prima facie,* it is not possible to say that the business of an auctioneer does not require any personal qualifications for its being carried out successfully It may be that anybody can set up the business as no restrictions have yet been imposed but so far as the assessee firm is concerned there can be no doubt that the circumstances relied on by them could lead to the conclusion that the main part of their profits depended on the personal qualifications of the partners and the Tribunal erred in rejecting the contention on general grounds On the facts and circumstances stated by us above which appear from the appellate order of the Tribunal and the statement of the case in our view it is possible to come to the conclusion that the income of the assessee depended mainly on the personal qualifications of the partners as contemplated by section 2(5) That is our answer to the question referred to us

The assessee is entitled to its costs which we fix at Rs 500

Question answered

APPELLATE CRIMINAL

Before Mr. Justice Dayal and Mr. Justice Agarwala

PARSHOTTAM

v.

STATE

1952
October 16

Indian Penal Code, 1860, s. 302—*Assault by one person armed with lathi—Severe blow on head after fall—grave, deliberate planned and cold blooded—It s. 302 applies.*

When it is established that *P* caused the fatal injury on the head resulting in the death of *R* that *P* struck *R* first on the leg with a lathi and then after his fall gave a smashing blow on his head so severely that it caused a big fracture and compression of brain and rupture of membranes with profuse bleeding and that the attack by *P* was deliberate planned and cold blooded

Held that the intention of *P* was not merely to cause injuries but to kill *R* that the proper section applicable to the conviction of *P* was s. 302 Indian Penal Code and that the appropriate sentence to be passed on *P* was one of death

Case law discussed

Criminal Appeal no. 793 of 1952 from an order of H. P. Asthana Sessions Judge of Banaras (as he then was) dated the 17th July 1952

The facts appear in the judgment

P. C. Chaturvedi for the appellant

The Government Advocate (*M. H. Faruqi*) for the State

The judgment of the Court was delivered by—

AGARWALA, J.—This is an appeal by Parshottam Ahir aged 40 years resident of Sakaldiha police station Balua district Banaras against his conviction under section 302 Indian Penal Code for the murder of Sri Raj Kishore Singh on 8th October 1950 and the

sentence of death There is also before us the usual reference for the confirmation of the sentence of death

Sri Raj Kishore Singh was a retired Additional Commissioner of this State After retirement he settled down in village Sakaldiha and took to gardening He used to go from his house every morning to his groves with his son, Sri Sanat Kumar Singh Both of them used to return at about 9 a m for tea and again go to the groves and return at midday for their lunch The appellant had his fields near the groves of Sri Raj Kishore Singh There were certain ponds from which he used to water them but it appears that in the year 1950 these ponds had not enough water for irrigation purposes Sri Raj Kishore Singh used to water his groves from another pond nearby The prosecution case was that as the appellant could not obtain sufficient water from the other ponds he tried to divert to his own plots the water of the pond from which Sri Raj Kishore used to water his groves He could have done this only by diverting the channels which had been dug by Sri Raj Kishore Singh from the pond to his own groves Sri Raj Kishore Singh was not agreeable to this and prevented the appellant from carrying out his intention The appellant appears to have resented this very much and took it to heart He complained about it to several persons but no one would help him This incident happened on the 7th October 1950 The next day that is the 8th October 1950 when Sri Raj Kishore Singh was returning from his groves at about midday after having sent his son to the labourers working in the groves the appellant armed with a *lathi* followed Sri Raj Kishore Singh to some distance and when Sri Raj Kishore Singh was half way on the *mend* of the field of one Mahadeo Lohar gave him a *lathi* blow on the right leg On receiving the blow Sri Raj Kishore Singh fell down on the ground

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and then the appellant gave him a smashing blow on the head resulting in profuse bleeding and in the fracture of the skull bone Raj Kishore Singh expired the next morning, at about 4 a m

The incident is alleged to have been seen by Sri Raj Kishore Singh's son Sanat Kumar Singh and some other persons who were watering the fields in the neighbourhood at the time

The first information report of the incident was lodged by Sanat Kumar Singh on the 8th October within about an hour of the incident Dr J P Gupta Medical Officer in charge of the Sakaldiha Dispensary was immediately called He found that the injury on the head was grievous and thought that Sri Raj Kishore Singh who was unconscious might die and opined that the Civil Surgeon be called The Civil Surgeon was also called from Banaras but he could render no help and Sri Raj Kishore Singh expired as already stated Dr J P Gupta examined the injuries when Sri Raj Kishore Singh was unconscious on the 8th October at 5 p m He found that there was a bruise on the outer aspect of the right leg 2" × ½" and also a contused wound 3" × ½" up to the bone on the left side of the head ½" above the ear with fracture of the skull bone with symptoms of compression of the brain The post mortem examination was held on the 9th October 1950 at Banaras at about 1 30 p m According to the report of the Civil Surgeon there was a contused wound on the top of the head on the left side 2½" long × ½" wide bone deep with contusion in an area 12" × 10" and there was bleeding from the wound He also found a contusion 16" × 6" on the right leg Internal examination of the body showed a fissured fracture of the vault running from ear to ear 10" long At the back it enclosed an area

with one limb $3\frac{1}{2}$" another 4" and the third 3" all depressed The membranes of the brain was deeply congested The brain was covered with a blood clot on the right side which was mostly $\frac{1}{4}$" thick The cause of death according to the doctor was fracture of the skull as a sequel of the contused wound on the head caused by a blunt weapon such as *lathi*

The appellant denied the commission of the offence

The prosecution produced Sanat Kumar Singh, Dinger Mossey Dasa and Sardhut as eye witnesses of the occurrence in support of its case We have examined their statements and have no reason to disbelieve them In concurrence with the findings of the learned Sessions Judge we are of opinion that the appellant caused the injuries to Sri Raj Kisoore Singh which brought about his death as alleged by the prosecution

The question then is what offence the appellant has committed It was strenuously urged that the offence committed by the appellant should be considered to be one of causing grievous hurt under section 325 Indian Penal Code In support of this contention a recent unreported decision of the Supreme Court *Hemant Prasad v State* (1) was cited In our opinion that decision has no application whatever to the facts of the present case In that case the facts were that three persons suddenly came from behind and attacked the deceased with lathis while he was walking The deceased would have normally taken another route but since he had some particular business on the day of the marpit he had taken that particular route There was no evidence to show that the appellant knew that the deceased was to pass that way The injuries caused to the deceased were four in number including one

(1) Supreme Court judgment dated the 15th May 1952

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contused wound on the back part of the crown of the head which caused a fracture of the skull and resulted in the death of the deceased. The other injuries were minor and simple in nature. There was no evidence as to which of the assailants had caused the minor injuries. In these circumstances the Supreme Court held that it could not be presumed that the appellants had the common intention of murdering the deceased but that the presumption could be made that the assailants had at least the common intention of causing grievous hurt to the deceased. Their Lordships however went on to observe: "The question as to what was the common intention of the assailants will depend on the facts of each case and where there is direct or circumstantial evidence to show that the intention of the assailants was to kill the victim a conviction under section 302 of the Penal Code would be justified even in a case like the present." Having regard to the facts of that particular case their Lordships however held that the appellants in that case were guilty of causing grievous hurt only under section 325 Indian Penal Code.

The present case differs from the case before the Supreme Court in several respects. In the first place in the present case it is known who caused the fatal injury on the head which resulted in death. It was the appellant himself who caused it. In the second place the circumstances attending the attack on the deceased suggest that the appellant had the intention to kill the deceased. The assailant took to heart the refusal of the deceased to allow him to carry water through the channels which had been constructed by the deceased to bring water from the pond to his own groves. A day later the appellant complained about this to other persons and on receiving no help from

them he was seen the next day following the deceased armed with a lathi and after the deceased had proceeded to some distance he struck the deceased on the leg and then when the deceased had fallen down on the ground he gave him a smashing blow on the head We have also seen that the blow struck was very severe as it caused a big fracture and compression of the brain and rupture of the membranes and profuse bleeding The attack was deliberate and planned It was cold blooded as no quarrel had taken place immediately before the attack was made—the quarrel had taken place a day earlier The smashing blow on the head was given when the deceased had fallen down It was given on the most vital part of the body with great severity All these circumstances to our mind, point to only one conclusion and to no other namely that the intention was not merely to cause injuries to the deceased but to kill him The present case in our opinion falls within the general observations of the Supreme Court which had been quoted above by us

The Supreme Court relied *inter alia* on *Emperor* v *Bhola Singh* (1) In that case (*Dalip Singh* v *Emperor*) which was decided by this Court reliance had been placed upon a Madras decision *Queen Empress* v *Duma Baidya* (2) In similar circumstances in the Madras case one man had given a lathi blow on the head fracturing the skull and two other persons had inflicted other simple injuries on the deceased It was held that the person who had inflicted the blow on the head which had resulted in the death of the deceased was guilty of murder We think that the *ratio decidendi* of the Madras case applies to the facts of this case

It was further contended that if section 325 Indian Penal Code did not apply to the facts of the present

(1) (1907) I L R 29 All 282 (2) (1896) I L R 19 Mad 483

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case, the case would at the most fall within the purview of section 304, Indian Penal Code and in this connexion a decision of this Court in *Perana* v. *Emperor* (1) was cited. In that case the prosecution version that the attack on the deceased was cold blooded and that it was not due to any immediate quarrel between the assailants and the deceased does not appear to have been accepted by the court as would appear from the following observations:

> We think that it is almost certain that there must have been some quarrel about this matter and that that was the immediate cause of the trouble between the parties.

In the circumstances the Bench did not draw the inference that there was an intention to kill but held that the accused intended to cause injuries which were likely to cause the death of the deceased. We have discussed this matter at length in a recent decision in *Behari* v. *State* (2). We have pointed out that the nature of the offence committed will depend upon (*a*) the intention of the accused, (*b*) his knowledge and (*c*) the nature of the injury caused. We stated:

> Where actual injury caused was sufficient in the ordinary course of nature to cause death and it could not be said that the injury was accidentally or negligently caused a strong presumption arises that the intention was to cause the injury which has been caused and as such the case would fall under clause (3) of section 300. It would be particularly so if the attack was premeditated just as it was in the present case. This presumption may be rebutted. It is not the law that where death is caused by one lathi blow alone the offence will invariably fall under section 304 Indian Penal

(1) 1936 A.L.J. 393 (2) 1952 A.L.J. 546

Code In determining the intention other circumstances as have been already mentioned in the earlier part of the judgment will also have to be taken into consideration

In *Perana s* case the assault appears to have been made as found by the Bench, in the heat of the quarrel It could be assumed in the circumstances that it was not intended that death should be caused or that an injury sufficient in the ordinary course of nature to cause death should be caused Death in such circumstances may be taken to be negligently or accidentally caused Where, however as in the present case the attack is pre planned the assailant follows the deceased for some distance and deliberately gives him a smashing blow on the head it may legitimately be inferred that the intention was to kill the deceased The inference as to intention will differ with the facts of each case We are of opinion that in the present case the inference drawn by the learned Sessions Judge was correct and that the conviction of the appellant under section 302 Indian Penal Code was justified

Lastly it was strongly urged that the appropriate sentence in a case of this kind is one of transportation for life and not of death Some instances in which the State Government had commuted the sentences of death passed by this Court to sentences of transportation for life were mentioned before us The Government is empowered under the Code of Criminal Procedure to commute sentences of death into sentences of transportation for life We have no reason to think that the State Government does not exercise its powers reasonably There must have been circumstances sufficient in the eyes of the State Government to justify commutation of the sentence of death in the cases mentioned to us However that may be we are not concerned

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PARSHOTTAM
v.
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Agarwal J.

with the action which the State Government may take after this Court passes its judgment We are concerned with administering the law as we find it If we find that according to the well established principles of law we should award the sentence of death we shall not fail to do so even though the State Government may commute it to a sentence of transportation for life In the present case we find no justification for awarding the lesser penalty by law The attack on the deceased was cold blooded pre planned and well calculated We think that in the circumstances of the case, even though death was caused by one single injury the appropriate sentence is one of death We therefore dismiss this appeal accept the reference and confirm the sentence of death which shall be carried out according to law

Learned counsel has applied for leave to appeal to the Supreme Court We do not consider that any case has been made out for granting leave to appeal to the Supreme Court The prayer is accordingly rejected

Appeal dismissed

CRIMINAL REVISION

Before Mr. Justice Agarwala and Mr. Justice Mukerji

KAMLA

v

STATE

1963
February 8

Criminal Procedure Code, 1898, ss. 133, 139A—*Preliminary enquiry held by Magistrate—Opposite party producing a copy of Patwari's record—No entry in it about the existence of public way but two roads existing not shown in it—If Magistrate justified to discredit—Single Judge ruling of this Court—Whether binding on courts below in preference to Division Bench ruling of other courts.*

Even a single Judge ruling of this Court of an earlier date is binding on the courts below in preference to a later Division Bench ruling of another court.

Where a Sub-Divisional Magistrate in proceedings under s. 133 of the Code of Criminal Procedure held a preliminary enquiry as directed by s. 139A of the Code and the only evidence produced before him in support of the denial of the existence of public way was a copy of the Patwari's record in which two roads admittedly existing were not shown though it did not contain any entry about the existence of the public way in dispute.

Held that the Magistrate was justified in holding that there was no reliable evidence in support of such a denial.

Case law discussed.

Criminal Revision no. 925 of 1950, from an order of Khalil Uddin Ahmad, Additional Sessions Judge of Gorakhpur, dated the 11th April, 1950.

K. C. Sahsena, for the applicant.

R. B. Misra, for the opposite party.

The judgment of the Court was delivered by—

AGARWALA, J.—This is a revision arising out of proceedings under section 133 of the Code of Criminal Procedure. Ram Bahal Tewari complained that the

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applicant Kamla and others had constructed a drain and a cesspool on a public thoroughfare and thus narrowed and obstructed the passage through which carts and lorries used to pass. A notice under section 133 of the Code of Criminal Procedure was issued by the Sub-Divisional Officer of Deoria to the applicant and others on which they filed an objection that there was no public thoroughfare at all at the place in question. Under the provisions of section 139-A of the Code of Criminal Procedure the Magistrate is required to hold an enquiry whether there is reliable evidence in support of the denial of the existence of public way. The learned Sub-Divisional Magistrate accordingly held a preliminary enquiry as directed by that section. It is admitted before us by learned counsel appearing for the applicant that the only evidence which the applicant could produce before the learned Sub-Divisional Magistrate in support of his denial was a copy of the Patwari's record. This record did not contain any entry about the existence of the public way in dispute. If matters had stood at this and there was nothing further to be seen this document could be considered to be reliable evidence in support of the denial of the right of public way and the Magistrate could very properly have stayed his hands and left the parties to agitate the matter in the civil court. But as it happened it was admitted by the applicant that two other roads which admittedly existed at the place were not shown in the document filed by them. This fact takes away all the evidentiary value from the document with the result that no reliable evidence in support of the denial of the right of way is left. In the circumstances, the learned Magistrate was perfectly justified in holding that there was no reliable evidence in support of such a denial.

Against this order the applicant went up in revision to the Additional Sessions Judge The learned Additional Sessions Judge considered the question whether the copy of the Patwari's records which was adduced in evidence by the applicant was sufficient evidence in support of the denial of the right of way He referred to *Satish Chandra Sen* v *Krishna Kumar Das* (1) in which it was held that the record of rights is a very valuable piece of evidence which raises a presumption of correctness of the entries therein He then referred to a Calcutta case *Muzaffar Ahamad* v *Khitindra Bhusan Gupta* (2) in which it was held that when the Magistrate comes to the conclusion that there is no reliable evidence in support of the denial it is not for the High Court to interfere in revision This Calcutta case was a Division Bench ruling Lastly the learned Judge referred to a single Judge ruling of this Court *Kundan Lal* v *Emperor* (3) In that case ALLSOP J held that unless the evidence produced in support of the denial of the right of way is frivolous the matter is one which can properly be decided by a competent civil court The learned Judge brushed aside the single Judge decision of this Court on the ground that a later Division Bench ruling of the Calcutta High Court favoured the opposite view In doing so the learned Additional Sessions Judge was obviously in error Even a single Judge ruling of this Court of an earlier date is binding on the courts below in preference to a later ruling of another court The learned Judge further did not apply his mind to the rulings cited before him In fact the rulings were not contradictory at all All of them were reconcilable In the case of *Satish Chandra Sen* v *Krishna Kumar Das* (1) the record of right did not contain an entry about the

(1) 128 I C 810 (2) A I R 1935 Cal 502
(3) A I R 1932 All 187

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existence of the public right of way which was claimed by the applicants. There was nothing to show that the record did not mention even the admitted existing public ways. In those circumstances it was held that the record of right was a reliable piece of evidence in support of the denial of public right of way. The ruling did not apply to the present case because of the circumstance that admittedly the record of right here did not record the existence of admitted public ways.

In *Muzaffar Ahamad* v. *Khitindra Bhushan Gupta* (1) the learned Judges laid down the obvious proposition that where the Magistrate makes an enquiry and comes to the conclusion that there was no reliable evidence in support of the denial it is not for the High Court to interfere. It does not appear from the report of that case that there was any reliable evidence which the Magistrate refused to take into consideration. The ruling has no application to a case in which there was reliable evidence and it was wrongly omitted to be taken into consideration by the Magistrate. The ruling of this Court in *Kundan Lal* v. *Emperor* (2) was in no way contradictory to the Calcutta case. That case also does not apply to the present case because in that case there was evidence in support of the denial of public way and the evidence was not frivolous. Here as already stated there is no reliable evidence in support of the denial.

The result, therefore is that we find no force in this application. It is accordingly dismissed.

Application dismissed.

(1) A.I.R. 1946 Cal. 302. (2) I.L.R. 1939 All. 187.

APPELLATE CIVIL

Before the Honourable B Malik, Chief Justice and Mr Justice Agarwala

LACHHMAN PRASAD (DEFENDANT)

v

1953
March 9

MST RASULAN AND OTHERS (PLAINTIFFS)

Indian Limitation Act, 1908, *Art 29—Property of stranger wrongfully attached in execution of decree by a decree holder—Suit by stranger for damages for wrongful seizure it falls under s 29*

When in the execution of a decree against a judgment debtor the decree holder wrongfully attaches property belonging to a stranger the suit by that stranger for recovery of damages for wrongful seizure against the decree holder is governed by Art 29 of the Limitation Act and the limitation begins to run from the date of attachment

Case law discussed

Second Appeal no 361 of 1950 from a decree of Raj Kishore Srivastava Civil Judge of Budaun dated the 28th November 1949

The facts appear in the judgment

P M Verma for the appellant

M A Kazmi for the respondents

The judgment of the Court was delivered by

AGARWALA, J —This is a defendant's appeal arising out of a suit for damages In execution of a decree against one Mohammad Yar Khan a certain standing crop was attached and placed under the custody of one Farid Khan Sapurdar Two objectors came forward claiming the crop to be their own One of them was

1953

LACHHMAN PRASAD v. MUSAMMAT BASGI.

AGARWAL J.

Qasim Khan. His objection was dismissed by the execution court but was allowed in appeal by the appellate court. The other was Shrimati Mahmood in whose objection was allowed by the trial court apparently before the appeal of Qasim Khan was allowed. There does not appear to have been any appeal against the decision in the objection of Shrimati Mahmoodan. The Sapurdar handed over the crop to Shrimati Mahmoodan before Qasim Khan's appeal was allowed. After Qasim Khan's appeal was allowed his successors in interest namely the plaintiffs, filed the suit which has given rise to this appeal for recovery of the price of crop valued at Rs 258. They impleaded the decree holder defendant no. 1 and the heirs of Farid Khan the Sapurdar defendants nos. 2 to 5. They did not implead Shrimati Mahmoodan in the suit.

In defence the liability for payment of any damages was denied and *inter alia* it was pleaded that the suit was barred by limitation. The trial court decreed the suit holding that it was within time. The appeal against the decree was dismissed by the lower appellate court.

In this Second Appeal the only point urged before us is whether the suit was barred by limitation. The dates necessary for deciding this question are as follows.

The attachment of crop was made on the 16th November 1943. On the 16th June 1944 the crop was delivered by Farid Khan to Shrimati Mahmoodan. The suit was filed on the 6th August 1945 i.e. more than one year after the attachment of the crop but before the expiry of three years.

The possible Articles to apply to a case of this kind may be Articles 29, 36, 48 or 49.

Article 29 says

For compensation for wrongful seizure of moveable property under legal process	One year	The date of the seizure

Article 36 says

For compensation for any malfeasance misfeasance or non feasance independent of contract and not herein specially provided for	Two years	When the malfeasance misfeasance or non feasance takes place

Article 48 says

For a specific moveable property lost or acquired by theft or dishonest misappropriation or conversion or for compensation for wrongfully taking or detaining the same	Three years	When the person having the right to the possession of the property first learns in whose possession it is

Article 49 says

For other specific moveable property or for compensation for wrongfully taking or injuring or wrongfully detaining the same	Three years	When the property is wrongfully taken or injured or when the detainer's possession becomes unlawful

It is clear from a perusal of these Articles that Article 36 is residuary Article applicable to compensation for torts where the same has not been specifically provided for elsewhere Article 48 applies when specific moveable property has either been lost stolen or dishonestly misappropriated or converted Article 49 applies to specific moveable properties other than those mentioned in Article 48 On the facts of the present case the standing crop could not be said to have been stolen or dishonestly misappropriated or converted to their own use by either the decree holder or the Sup urdar Therefore Article 48 could not apply nor could Article 49 apply because the crop was not detained by them even otherwise than by theft etc As against Shrimati Mahmoodan the case would have fallen either under Article 48 or 49 but as against the decree holder the case clearly falls under Article 29 This view is supported by a number of decisions *vide Ram Narain v Umrao Singh* (1) *E G M Firm v C M Banking Co* (2)

(1) (1907) I L R 29 All 615 (2) A I R 1940 Rang 276

1953

LACHHMAN PRASAD v. MUHAMMAD RASULAN

Jagtiban Nando Roy v. *Sarat Chandra Ghosh* (1). Our attention was drawn to the following two cases *Jadu nath Dandupat* v. *Hurikar* (2) and *Surat Lall Mondal* v. *Umar Haji* (3). In both these cases the allegation was that the defendant had wrongfully misappropriated the property and Article 48 was applied and we think, with respect rightly. These cases are therefore clearly distinguishable.

The appeal is therefore allowed. The decrees of the courts below are set aside and the plaintiff's suit is dismissed. The appellant will be entitled to his costs throughout.

Appeal allowed.

APPELLATE CIVIL

Before the Honourable B. Malik, Chief Justice, and Mr. Justice Bhargava.

DEVI PRASAD (DEFENDANT)

1953
May 1

v.

JANKI PRASAD (PLAINTIFF)

United Provinces (Temporary) Control of Rent and Eviction Act, 1947, s. 3—*Suit for ejectment and arrears of rent filed—Permission for institution of suit obtained by District Magistrate during pendency of suit—Permission filed—Suit for ejectment dismissed—Fresh suit if could be filed on the same permission—Arrears of rent accepted by plaintiff for months prior to giving notice—Permission obtained whether becomes infructuous.*

Where a plaintiff without obtaining the permission of the District Magistrate for the institution of a suit had filed a suit

(1) (1900) 7 C.W.N. 728. (2) (1913) 18 I.C. 258.
(3) (1895) I.L.R. 22 Cal. 817.

for ejectment and arrears of rent but the suit for ejectment was dismissed in spite of the permission being obtained and filed during the pendency of suit

Held, that the permission had not exhausted itself and the plaintiff could file a second suit on the strength of the same permission

Held further that in the case of a month to month tenancy a plaintiff in accepting rent for months prior to giving of notice for ejectment does not disqualify himself from claiming his legal right to eject and thereby put an end to a permission obtained for filing a suit

Letters Patent Appeal no 59 of 1951 from a decision of Mushtaq Ahamad, J, in Second Appeal no 1413 of 1949 decided on 12th December 1950

The facts appear in the judgment

Baleshwari Prasad for the appellant

D Sanyal for the respondent

The judgment of the Court was delivered by—

MALIK C J —This is a defendant's appeal against a judgment of a learned single Judge of this Court The defendant was a month to month tenant of a house The plaintiff gave a notice on the 22nd of January 1948 requiring the defendant to vacate the house in suit by the 29th of February 1948 The suit out of which this appeal has arisen was filed on the 16th of March 1948 for ejectment and arrears of rent Rent was claimed from 1st October 1946 to 30th June 1947 at the rate of Rs 37 8 and again from 1st October 1947 to 29th February 1948 at the same rate For the period during which the defendant had continued to occupy the premises after the 29th of February, 1948 that is from 1st March 1948 to 15th March 1948 damages were claimed at the rate of Rs 56 4 per month As the United Provinces (Temporary) Control of Rent and Eviction Act (III of 1947) was applicable the plaintiff had taken the permission

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DEVI PRASAD v. JANKI PRASAD

Malik C. J.

of the District Magistrate under section 3 on the 27th of June 1947 and the plaintiff relied on the permission for his right to institute the suit. The relevant portion of section 3 is as follows:

> No suit shall without the permission of the District Magistrate be filed in any civil court against a tenant for his eviction from any accommodation except on one or more of the following grounds:
>
> (*a*) that the tenant has wilfully failed to make payment to the landlord of any arrears of rent within one month of the service upon him of a notice of demand from the landlord;

The exceptions to section 3 were not of importance as according to the plaintiff he had taken the permission of the District Magistrate and by giving a valid notice to quit had terminated the tenancy with effect from the 29th of February 1948.

On behalf of the defendant two points were raised: firstly that the plaintiff could not avail himself of this permission as the permission had exhausted itself; and secondly that the plaintiff was not entitled to claim damages for the period during which the defendant was holding over. The trial court held in plaintiff's favour on both the points with the result that he decreed the plaintiff's suit for recovery of Rs. 408-12 only as rent up to 15th March 1948. The relief for ejectment was refused.

On appeal by the plaintiff the lower appellate court decreed the suit for ejectment and also allowed the plaintiff damages for the period during which the defendant had held over i.e. from the 1st March 1948 to the 15th March 1948.

The defendant filed a Second Appeal in this Court and before the learned single Judge only two points were raised, firstly, that the permission had exhausted itself and the plaintiff was not entitled to rely on it, and secondly that the defendant having paid rent for the months of July, August and September 1947, and the plaintiff having accepted the same he had no right to rely on the permission No point was raised before the learned single Judge as regards damages claimed for the period from the 1st of March, 1948 to the 15th of March, 1948

In this appeal learned counsel has urged the two points that were urged before the learned single Judge and he has also argued that the plaintiff was not entitled to any damages after the 1st of March 1948 As the last point was not taken before the learned single Judge we cannot allow him to raise a new point before us As regards the ground that the permission had exhausted itself and that the plaintiff by reason of his acceptance of rent was not entitled to rely on the same we are not satisfied that the appellant has been able to make out a good case

The ground on which the argument is based is that the plaintiff had filed a suit on the 18th of December 1946 being suit no 790 of 1946 for the ejectment of the defendant and for arrears of rent The plaintiff had not obtained any permission of the District Magistrate for the institution of the suit That suit was dismissed on the 20th of September 1947 for ejectment though arrears of rent claimed were decreed During the pendency of that suit the plaintiff had applied to the District Magistrate for permission and the District Magistrate on the 27th of June 1947, had granted the permission in these terms

> Reference your letter dated 6 6 47 for permission to file a civil suit against Mr Debi Pd,

1953

DEVI PRASAD v. JANKI PRASAD

Malik C.J.

Reid D S P, for ejectment of the kothi occupied by him Permission is hereby given to file a civil suit for ejectment against Mr Debi pd Reid D S P

(Sd) S N DEY,
For *District Magistrate, Bulandshahr*
27 6 47

Learned counsel has urged that having filed this permission in the previous suit and that suit having been dismissed the plaintiff cannot file a second suit on the strength of the same permission The previous suit was dismissed on the ground that the District Magistrate had to give permission to file a suit and the permission given by the District Magistrate being to file a suit the plaintiff cannot avail himself of that permission to continue a suit already filed The suit was no suit at all in the eye of law and the defect of not obtaining the permission to institute it could not be cured by the subsequent obtaining of the permission That being the position the plaintiff was entitled to file a fresh suit on the basis of the permission already given and there is nothing in that permission given by the District Magistrate to show that he meant by that permission that the plaintiff was allowed only to continue suit no 790 of 1946 which had already been instituted As a matter of fact the permission is clearly worded and shows that the learned Magistrate granted the permission in accordance with the provisions of section 8 to file a suit in the civil court

The other argument that the acceptance of rent for the months of July August and September 1947 put an end to this permission has also no substance The defendant was a month to month tenant Under the Transfer of Property Act the landlord was entitled

to terminate the tenancy by a notice in accordance with the provisions of section 106 of the Transfer of Property Act By reason of the provisions of the United Provinces (Temporary) Control of Rent and Eviction Act however, this notice could be of no avail unless the District Magistrate s permission had been taken to file a suit The defendant was liable to pay rent to the plaintiff every month the rent as it became due and by accepting rent for the months of July August and September it cannot be said that the plaintiff had done something to disqualify himself from claiming his legal right to eject The notice for ejectment as we have already mentioned was given on the 22nd of January 1948 and it is not suggested that any rent was accepted by the plaintiff after the date of the expiry of the notice

The appeal has no force and is dismissed with costs The stay order is discharged The record may be sent down to the lower court by an early date

Appeal dismissed

CIVIL MISCELLANEOUS

Before the Honourable B Malik, Chief Justice and Mr Justice Agarwala

KESHAB CHANDRA (APPLICANT)

1953
May 4

v

THE INSPECTOR OF SCHOOLS FARRUKHABAD AND OTHERS (OPPOSITE PARTIES)

Constitution of India, *Art 226—Educational Code, paragraph 96—Rustication of student by Inspector of Schools without enquiry or report from Principal Order of rustication if contravened paragraph 96 of Educational Code—Natural justice principles of*

Where an Inspector of Schools passed an order rusticating an applican *K* along with other students without making any enquiries about the actual participation of *K* in the trouble or even calling for a report from the Principal of the College in which *K* was reading and where some trouble had occurred on the date of incident

Held that the order of rustication in contravention of paragraph 96 of the Educational Code and not having been made on a report of the Principal the Inspector of Schools had no power to make it The order also violated the principles of natural justice.

Civil Miscellaneous no 245 of 1953

The facts appear in the judgment.

R C Ghatak for the applicant

The Senior Standing Counsel (*Gopalji Mehrotra*) for the opposite parties

The judgment of the Court was delivered by—

MALIK C J —This case discloses rather an unfortunate state of affairs On the 12th of September, 1952, there was some trouble in front of a school known as K R Rastogi Higher Secondary School Farrukhabad

One of the boys reading in that School was the applicant Keshab Chandra son of Mukta Prasad He was a student of XII class In the fracas between the police and the students two police officers received some injuries A report was made at the police station that about 150 to 200 students had taken part in the incident but their names were not mentioned The only name given in the report was that of a lecturer of the said School, Suresh Chandra Shukla

Whether the students of this particular institution had taken part in the fracas and who they were is not a matter about which we can express any opinion We have been informed that there is a case pending against ten students in the court of the Magistrate Fatehgarh

On the 9th of October 1952 even before the students who had been arrested had been put up for identification the Inspector of Schools passed an order rusticating a number of boys On the 16th of September, 1952, the applicant was arrested but he was released on bail the same day On the 6th of December, 1952 he was put up for identification but no one identified him as among those who had taken part in the affray In the affidavit in support of the application it is mentioned that the applicant was never sent for or interrogated by the Principal of the School in connexion with the incident and the Principal did not make any report against the applicant to the Inspector of Schools It is further mentioned that neither the Director of Education nor the Inspector of Schools made any enquiries before rusticating the applicant and some other boys on the 9th of October 1952 As a matter of fact in the rustication order even the name of the boy was not correctly given He was described

1953

KESHAB CHANDRA v. THE INSPECTOR OF SCHOOLS FARRUKHABAD

Malik C.J.

as Kishan Chandra, son of Mukta Prasad though his name is Keshab Chandra son of Mukta Prasad.

Notice of this application was issued to the opposite parties which included the Inspector of Schools, Farrukhabad, the Director of Education Uttar Pradesh, the Board of High School and Intermediate Education U. P., and the Principal, K. R. Rastogi Higher Secondary School, Farrukhabad, and no counter affidavit has been filed on their behalf. We must, therefore, take it that the facts given in the affidavit in support of the application are correct. It would then mean that without any enquiry whatsoever either by the head of the institution or by the Inspector of Schools or by any authority higher than him the applicant was rusticated, probably because of some private information of which we know neither the source nor the nature.

It is not necessary for us in this case to go into the question whether a student reading in an educational institution has any legal right to continue to read in that institution or whether any disciplinary action taken by the head of the institution or those in charge of maintenence of discipline can be made subject to scrutiny in a court of law. To hold that a student has a legal right to come to a court of law and require the head of the institution to justify his action where he has meted out some punishment or taken any disciplinary action will be subversive of all discipline in our schools and colleges and we must not therefore be deemed to have countenanced any such suggestion by this order. As a matter of fact in more than one case we have observed that the Court will not interfere in the internal autonomy of educational institutions.

In this case however that question does not arise. No disciplinary action has been taken by the Principal

who is primarily responsible for maintenance of discipline in the institution. The Inspector of Schools is an officer appointed by the Government to supervise the work of those who are in charge of these institutions and he is bound by certain instructions issued by the Government as to how he has to conduct himself in the discharge of his duties. Under paragraph 96 of the Educational Code of Uttar Pradesh 1936 Edition the head of an institution has been made responsible for maintenance of discipline and has been given the right to punish and even expel a boy from a school or college. In very serious cases where the student deserves severer punishment than he can inflict i.e. where a student has not only to be expelled from the school or college but his admission in any other institution has to be debarred a report has to be made to the Inspector of Schools who passes an order debarring his admission in any other institution for a specific period. In this case the Principal took no action. He made no enquiries. The Inspector never directed him to take any steps. They made no inquiries and yet they rusticated the boy. In the circumstances disclosed in the affidavit we think that the Inspector was not justified in passing the order that he did. His action violates all principles of natural justice. He seems to have been very hasty in his action and he passed the order without even calling for a report from the Principal as to whether the boy had really taken part in the incident or not. The order being in contravention of paragraph 96 of the Educational Code and not having been made on a report of the Principal the Inspector of Schools had no power to make it.

The result, therefore, is that we allow this writ application and set aside the order of rustication passed

1953

KESHAB CHANDRA v. THE INSPECTOR OF SCHOOLS FARRUKHABAD

Malik C.J.

by the Inspector of Schools on the 9th of October, 1952

Before we leave this case, however we may mention that on behalf of the learned standing counsel the question of jurisdiction of this Court in passing the order under Article 226 of the Constitution when the rustication order was passed by the Inspector of Schools in contravention of the provisions of paragraph 96 of the Educational Code and not by the Principal was not raised and we have therefore not considered that question Learned standing counsel pointed out that if the order of expulsion had been passed by the Head of the Institution or by the Inspector of Schools in accordance with the provisions of paragraph 96 of the Educational Code he would have raised the point that Article 226 could not be invoked by the applicant for the quashing of the order

We do not think that it is a case in which we should make any order as to costs

Order accordingly

CIVIL MISCELLANEOUS

Before Mr Justice Mootham and Mr Justice Gurtu

MATWAL CHAND (APPLICANT)

v

1953
May 5

DISTRICT MAGISTRATE BUDAUN AND OTHERS (OPPOSITE PARTIES)

United Provinces Municipalities Act, 1916, *s 180(1)—Plan sanctioned by Municipal Board—Sanction not valid in law—Whether Board has power to revoke it—Meaning of word may explained—Building Bye law no 7 if unreasonable and invalid*

A municipal board having once sanctioned a plan submitted to it has power to revoke that sanction subsequently if it is not a valid sanction in law

The word may in s 180(1) of the Municipalities Act has reference to the power to sanction and does not control the opening words of the sub section

Building Bye law no 7 is not invalid and unreasonable inas much as it does not involve an oppressive interference with the rights of the subject

Case law discussed

Civil Miscellaneous no 54 of 1953

The facts appear in the judgment

A P Pandey and *S B Jauhari* for the applicant

The Senior Standing Counsel (*Gopalji Mehrotra*) for the opposite parties

The judgment of the Court was delivered by—

MOOTHAM, J —This is a petition under Article 226 of the Constitution wherein the petitioner prays for the issue of a writ of *mandamus* to direct the opposite parties to refrain from interfering with the further progress of the building by the petitioner of a temple

1953

MATWAL CHAND v. DISTRICT MAGISTRATE BUDAUN

Mootham J.

The facts upon which reliance is placed by the petitioner can be shortly stated. The petitioner is a Sikh who together with a number of other members of his community migrated to India from what is now West Punjab at the time of the partition. These persons were provided with accommodation in a mohalla in the city of Budaun which had been predominantly a Muslim locality. In 1952 the petitioner in his capacity as Secretary of the Punjabis Sanatan Dharam Sabha, Budaun purchased a vacant plot of land for the purpose of constructing a temple reading room and a *dharam shala*. On the 4th August, 1952 he applied under section 178 of the United Provinces Municipalities Act, 1916 for permission to erect these buildings on the land which he had purchased and on the 5th September 1952, sanction to do so was given to him by the Executive Officer on behalf of the Municipal Board. Work on the construction of the temple was begun and it is said that about Rs 20,000 has already been spent.

Immediately to the west of the plot of the land purchased by the petitioner is a mosque which the petitioner says was at the time he purchased the land partly in ruins and not in use. The construction of the temple in close proximity to the mosque became a matter of concern to the other Mohammedan inhabitants of Budaun and on the 13th November 1952 the District Magistrate wrote to the President of the Municipal Board a letter in which he expressed the view that the existence of a temple adjacent to the mosque was not desirable from the point of view of law and order and enquired whether this aspect of the matter had been considered by the Municipal Board. Presumably as a result of this letter a notice was, on the 14th November 1952 served by the Board on the petitioner informing him that the sanction had been

revoked That letter has not been produced before us, but according to the petitioner it was stated therein that the sanction had been granted under a mistake as the proposed construction contravened the provisions of Building Bye law no 7 which is in the following terms—

> 7 No mosque, temple church or other sacred or religious building shall be erected (*a*) unless the frontage is at least 10 feet from the centre of the street on which it abuts and (*b*) unless it is situated at a distance of not less than 100 yards from any other sacred or religious building of another sect or religion

On behalf of the Municipal Board a lengthy affidavit has been filed a large part of which is hearsay The case for the Board is that the Executive Officer of the Board sanctioned the plans submitted by the petitioner without applying his mind to the matter that the plans submitted by the petitioner were not in accordance with Building Bye laws nos 2 and 3 and that the sanction of the Board had been obtained by fraud and misrepresentation on the part of the petitioner These however are not matters which we can examine in a petition under Article 226 nor in the view which we take is it necessary to do so

The petitioner s contention is that the Municipal Board having once sanctioned the plan submitted to it had no power subsequently to revoke that sanction To this it is answered that as the Board s power to sanction the construction of a building is under sub section (1) of section 180 of the United Provinces Municipalities Act subject to the provisions of any bye law the alleged sanction upon which reliance is placed by the petitioner was in law no sanction at all an argument which the petitioner seeks to refute on the ground that the Municipal Board had power to

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Mootham J.

dispense with the requirements of its own bye laws and that in this case it had done so

The relevant portion of section 180 of the Act is in these terms

> 180 *Sanction of work by board*—(1) Subject to the provisions of any bye law, the board may either refuse to sanction any work of which notice has been given under section 178 or may sanction it absolutely or subject to
>
> certain directions that it may think fit to issue

Mr *A P Pandey*, who appeared for the petitioner, has argued that the use of word may in this sub section gives the Municipal Board power to ignore the provisions of its bye laws if it so chooses No authority has been cited in support of this proposition which would appear to involve construing the expression subject to as the equivalent of notwithstanding In our opinion the word may has reference to the power to sanction and does not control the opening words of the sub section

The law on the point appears to us to be clea In *Yabbicom* v *King* (1) a local authority empowered to make bye laws for the regulation of buildings within its jurisdiction purported to sanction plans which were not in conformity to such bye laws In a ca e cited by the local justices DAY, J said

> The district council could not control the law and bye laws properly made have the effect of laws, a public body cannot any more than private persons dispense with laws that have to be administered they have no dispensing power whatever

This case was cited with approval in *William Bean & Sons* v *Flaxton Rural Council* (2) where at page 467 SANKEY, L J said

(1) L R [1899] 1 Q B 401 (2) L R [1929] 1 K B 450

It is clear on the case of *Yabbicom v King* (1), referred to in the learned Judge's judgment that a local authority has no power to sanction plans in contravention of its own bye laws properly made

Mr *Pandey* has drawn our attention to certain cases in which the court had held that a sanction once accorded cannot be revoked namely *Nanak Prasad v Municipal Board, Rae Bareli* (2) *Vithal Dhanddey v The Alibag Municipality* (3), *Municipality of Sholapur v Abdul Wahab Shaik Chand* (4) and *Tullaram v The Corporation of Calcutta* (5) We do not however think that these cases are of any assistance to him for in none of them was the sanction which had been accorded by the municipal authority held to be in excess of its power, in each case the sanction was a valid sanction which it was held could not be revoked in the absence of express statutory provision Particular reliance was placed by Mr *Pandey* on *Tullaram's* case (5) In that case the Corporation had granted to the plaintiff sanction to erect a mill on his giving a certain undertaking to the Corporation The undertaking not having been complied with the Corporation purported to withdraw its sanction It was held that the sanction having been validly granted under section 247 of the Calcutta Municipal Consolidation Act it became absolute and the Corporation had its remedy in a civil court for enforcement of that condition The case does not, therefore in our opinion touch upon the question which we have to consider here

Finally it was suggested on behalf of the petitioner that Building Bye law no 7 was an unreasonable bye law

(1) L R [1889] 1 Q B 444 (2) A I R 1943 Oudh 292
(3) (1918) I L R 42 Bom 639 (4) A I R 1921 Bom 489
(5) (1902) I L R 30 Cal 317

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Meetham J.

and therefore invalid With this suggestion we are wholly unable to agree A municipal board has under sub section (1) of section 298 of the Act power to make bye laws applicable to the whole or part of the municipality consistent with the Act and with any rule, for the purpose of promoting or maintaining the health, safety and convenience of the inhabitants of the municipality and under sub section (2) of the same section it has the power given to it by item (g) of List I A to make bye laws

> prescribing the circumstances in which a mosque temple church or other sacred building may or may not be erected, re erected, or altered

This Court will be slow to declare invalid the legislative act of a local authority The bye laws of such a body ought to be supported if possible or as it has been said they ought to be benevolently interpreted and credit ought to be given to those who have to administer them that they will be reasonably administered *Kruse v Johnson* (1) Learned counsel for the petitioner conceded that the test was whether the bye law involved an oppressive interference with the rights of the subject We are unable to see that this bye law has any such effect

Although the petitioner has stated that at the time sanction was given to him the adjoining mosque was not in use and neglected—an allegation which is strongly denied by the Municipal Board—it has not been argued before us that it did not constitute a religious building within the meaning of Building Bye law no 7 It is not in dispute that the erection of the proposed temple would constitute a contravention of this bye law (assuming that the bye law is not invalid as being unreasonable) and therefore we are of opinion

(1) L R [1898] 2 Q B 91

that the sanction which the Executive Officer purported to accord to the petitioner on the 5th September, 1952, was not a valid sanction in law. In our opinion, therefore, this petition fails and must be dismissed.

During the course of the hearing we granted the parties at their request an adjournment to explore the possibility of arriving at an agreement satisfactory to both parties. Unfortunately no agreement has been reached. Nevertheless the matter appears to us to be eminently one in which the good sense of both parties should prevail. We understand that the building which is in the course of erection is capable with only very minor alterations of being used as a *dharamshala* and we understand further that the Municipal Board has no objection to it being constructed and used for this or any other secular purpose. In these circumstances we would like to express the view that now that this case is over the parties will in the general interest be able to arrive at a satisfactory adjustment of their difficulties. In the circumstances we make no order as to costs.

Application dismissed.

APPELLATE CIVIL

Before the Honourable B Malik, Chief Justice and Mr Justice Roy

BADDEY SHRIMATI (DEFENDANT)

v

1953
December 14

SHRIMATI MAHADEVI (PLAINTIFF)

United Provinces (Temporary) Control of Rent and Eviction Act, 1947, *s 3 cl (a)—Meaning explained—Transfer of Property Act* 1882 *s* 106—*Notice under s* 106 *of T P Act and s 3 of Rent Act, if can be given simultaneously*

B the tenant of a premises with monthly tenancy ending with the end of the month had not paid rent to *M* her landlord since 1st May 1951 *M* served a notice on *B* on 4th September 1951 asking her to pay rent due up to end of August 1951 within 15 days and also required her to vacate house by 30th September 1951 *B* not having paid anything *M* filed a suit for arrears of rent and ejectment

Held, that *B* not having made any payment within one month of service of notice of demand on her *M* had a right to file the suit and the fact that the notice gave 15 days time did not vitiate the notice

Held, further that a notice under s 106 of the Transfer of Property Act and a notice under s 3 of the Control of Rent and Eviction Act can be given simultaneously

Special Appeal no 60 of 1953 from a decision of Brij Mohan Lal J dated the 11th February 1953 in Second Appeal no 348 of 1949

The facts appear in the judgment

S N Verma for the appellant

B N Misra for the respondent

The judgment of the Court was delivered by—

MALIK C J —This is a Special Appeal filed against the judgment of a learned single Judge dismissing a

second appeal under Order XLI rule 11 of the Civil Procedure Code The defendant was the tenant of a premises of which the plaintiff was the landlord The defendant had not paid the rent since the 1st of May 1951 and on the 4th of September 1951 the plaintiff served a notice on the defendant asking her to pay the rent due up to the end of August 1951 within 15 days The notice also required the defendant to vacate the house by the 30th of September, 1951 The tenancy was a month to month tenancy ending with the end of the month The defendant paid no heed to the notice and did not make any payment On the 6th of November 1951 the plaintiff filed the suit for arrears of rent and ejectment out of which this appeal has arisen

Section 3 (a) of the United Provinces (Temporary) Control of Rent and Eviction Act (III of 1947) requires that if a landlord has not obtained the permission of the District Magistrate to file a suit for ejectment he can only file such suit if any of the grounds mentioned in section 3 exists The first ground mentioned in that section is as follows

> (a) that the tenant has wilfully failed to make payment to the landlord of any arrears of rent within one month of the service upon him of a notice of demand from the landlord

The fact that notice was served on the 4th of September 1951 and no payment was made when the suit was filed on 6th of November 1951 being admitted the requirements of section 3 were fulfilled The fact that the plaintiff has asked the defendant to pay the amount within 15 days did not matter The suit was not filed till after the expiry of one month All that this clause requires is that the tenant should have wilfully failed to make payment within one month of

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BADDEN SHMATI v. SHMATI MAHADEO

Malik C. J.

the service of the notice On the admitted facts that the defendant had not made any payment within one month of the service of the notice of demand on her the plaintiff had a right to file the suit and the fact the notice gave 15 days time did not vitiate the notice

It is urged further that the defendant had thus a period of one month s grace within which to pay and during that period the plaintiff had no right to serve on her a notice under section 106 of the Transfer of Property Act (IV of 1882) Section 106 of the Transfer of Property Act provides that a lease of immovable property for any other purpose (that is not for agricultural or manufacturing purposes) shall be deemed to be a lease from month to month terminable on the part of either lessor or lessee by 15 days notice expiring with the end of a month of tenancy There is no reason nor has learned counsel been able to suggest any why a notice under section 106 of the Transfer of Property Act and a notice under section 8 of the Control of Rent and Eviction Act cannot be given simultaneously If the defendant had made the payment the plaintiff would have had no right to file a suit by reason of the provisions of section 8 of the Control of Rent and Eviction Act

The appeal was rightly dismissed by the learned single Judge This Special Appeal has no force and is dismissed with costs

The stay application is also dismissed

We notice that the appeal has not been registered or numbered Notice of the appeal was accepted by learned counsel for the respondent The office should register and number the appeal and prepare a proper decree

Appeal dismissed

MATRIMONIAL

Before Mr. Justice Brij Mohan Lal

MRS. AVRIL ELLEN SMITH (PETITIONER)

v

REGINALD FRANK SMITH (RESPONDENT)

1954
February 5

Indian Divorce Act, 1869, *ss. 2, 10—Indian and Colonial Divorce Jurisdiction Act 1926 [amended in 1940] s. 2—Couples domiciled outside India—Indian courts whether have jurisdiction to pass decrees for dissolution of marriage*

Indian courts have no jurisdiction either under the Indian Divorce Act or under the Indian and Colonial Divorce Jurisdiction Act to pass decrees for dissolution of marriages of couples domiciled outside India.

Case law discussed.

Matrimonial Suit no. 2 of 1953.

The facts appear in the judgment.

R. C. Sinha for the petitioner.

BRIJ MOHAN LAL, J.—This is a wife's petition for dissolution of her marriage with her husband (hereinafter described as respondent) on the ground of alleged adultery, cruelty and desertion.

The respondent pleads *inter alia* that he is a British subject domiciled in England and therefore this Court has no jurisdiction to pass a decree for dissolution of his marriage.

The petitioner's counsel contended in the first place that it was not admitted by his client that the respondent was domiciled in England and in the alternative that even if it was proved that the respondent's domicile was in England the courts in this country could give the petitioner a decree for dissolution of marriage

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Brij Mohan Lal J.

which would be operative in India though not in England. In support of this contention he relied on the case of *Mrs. Nan Greenwood v. H. H. Greenwood* (1). In that case PULLAN J. held that where neither party was proved to be domiciled in India the Indian courts could grant a petition for dissolution of marriage which would be valid for all purposes throughout India although it might not be operative beyond the limits of this country.

The first point that arises for decision is whether the respondent is domiciled in England. If that is proved the petitioner also will be deemed to be domiciled in that country because the wife's domicile always follows that of her husband. The respondent came out to India about thirty years ago. He was formerly a Warrant Officer in the Army but later on he gave up that service and took up employment with the Railways. At the time of his marriage with the petitioner in 1950 he was a railway employee. The petitioner admits that the respondent is registered as a British subject with the British High Commissioner. Further she admits that he holds a British Passport. In 1948 i.e. before her marriage the petitioner had taken a British Indian Passport. But when he got it renewed in 1953 i.e. after her marriage her Passport was also renewed as a British Passport. She however adds that her husband had told her that he had an intention to stay on in India and to make India his home. I am not prepared to believe this portion of her statement. She had obviously made this statement with a view to prove the Indian domicile. On a consideration of the evidence on record I have no hesitation in holding that the respondent, and consequently the petitioner, are both domiciled in England.

(1) A.I.R. 1923 Orissa 218.

In my opinion, the preliminary objection taken by the respondent is well founded. The question of Indian High Courts jurisdiction over Christian couples domiciled in England has been engaging the attention of the courts in India for a long time and has a history of its own. In the Indian Divorce Act (IV of 1869) as originally passed, jurisdiction was conferred on courts in India to grant petitions for dissolution of marriage provided the petitioner professed Christianity, resided in India at the time of the presentation of the petition and (1) either the marriage was solemnized in India or (2) adultery was committed in India. Since the statute conferred jurisdiction on Indian courts to pass decrees for dissolution of marriage on the fulfilment of the aforesaid conditions irrespective of the domicile of the parties, the said courts began to exercise this jurisdiction even in respect of couples domiciled outside India. The English courts however were of the opinion that under the principles of international law it was only the tribunal situate in the country of domicile which could dissolve the marriage. An argument was sometimes advanced in Indian courts that residence in India gave a matrimonial domicile TO THE PARTIES and, therefore the Indian courts could exercise jurisdiction so as to pass decree for dissolution of marriage which would be operative in India only. But such decrees created a very anomalous situation in so far as the parties ceased to be husband and wife within the limits of India but continued to be tied in matrimonial bondage in their own country. The matter came up before the Privy Council in the case of *Le Mesurier* v. *Le Mesurier* (1) wherein their Lordships remarked at page 536 as follows

> 'When carefully examined neither the English nor the Scottish decisions are, in their Lordships

(1) L.R. [1895] A.C. 517

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opinion sufficient to establish the proposition that in either of these countries, there exists a recognized rule of general law to the effect that a so-called matrimonial domicile gives jurisdiction to dissolve marriage.

It is true that that was a decision on appeal from Ceylon and there was no particular reference to the jurisdiction of Indian Courts. But under section 7 of the Indian Divorce Act the Indian courts are bound to follow principles and rules which are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief. Therefore if the English courts could not act on the principles of matrimonial domicile the Indian courts also could not do so.

On page 540 their Lordships of the Privy Council in the aforesaid case came to the conclusion that according to international law the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage. They concurred without reservation in the views expressed by Lord PENZANCE in *Wilson* v. *Wilson* (1) and deprecated the scandal which arises when a man and woman are held to be man and wife in one country and strangers in another.

The question came up again for decision before the President of the Probate Court in England in the case of *Keys* v. *Keys and Gray* (2). In that case the parties had obtained a decree nisi from the High Court at Lahore which decree had subsequently been made absolute. Still it was held by the aforesaid Court that the parties continued to be husband and wife and a fresh decree for divorce had to be granted. It was

(1) I.L.R. (1889-72) 2 P. 454.42 (2) I.L.R. (1921) P. 204

further held that the courts in India had no jurisdiction to pass decrees for dissolution of marriage in respect of couples domiciled in England.

This decision was followed by the Bombay High Court in *Alfred Wilkinson* v. *Emily Norah Wilkinson* (1) and by the Rangoon High Court in *Mr. A. H. D. Jones* v. *Mrs. K. Jones* (2).

The matter came up before the Lahore High Court also but it refused to accept that decision as authority and adhered to the view that the Indian courts had jurisdiction to pass decrees for dissolution of marriage in respect of couples domiciled in England.

To put an end to this unsatisfactory state of affairs, the Legislature intervened and passed the Indian Divorce (Amendment) Act (XXV of 1926). The relevant clause of section 2 as amended runs as follows:

> Nothing hereinafter contained shall authorize any court ... to make decrees for dissolution of marriage except where the parties to the marriage are domiciled in India at the time when the petition is presented.

After this amendment it became clear beyond doubt that the Indian courts could not grant a decree for dissolution of marriage if the parties were domiciled outside India. The Indian law was thus brought in conformity with the view expressed by the Privy Council and the Probate Court in England. But it was at the same time realized that in some cases a party might because of poverty or other causes find it difficult to take a journey to England simply to get his or her marriage dissolved. To provide facilities

(1) (1928) I.L.R. 47 Bom. 848. (2) [illegible] 76 I.C. 567.

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Beg, Mohan Lal, J.

in such cases the British Parliament passed the Indian and Colonial Divorce Jurisdiction Act, 1926 (16 and 17 Geo. V, C. 40). By means of this Act the Indian courts were given jurisdiction, subject to certain limitation to pass decrees for dissolution of marriage in cases where the parties were domiciled in England or Scotland. The limitations were directed mainly to ensure that the practice and procedure to be followed in such cases would be in accordance with the law prevalent in England. The result therefore was that while the jurisdiction of Indian courts to pass a decree for dissolution of marriage in the case of a couple domiciled in England was completely taken away under the Indian Divorce Act, the said jurisdiction was conferred in Indian courts under the Indian and Colonial Divorce Jurisdiction Act. This state of affairs continued for about two decades till the grant of Independence to India. On the 15th of August, 1947, the Indian Independence Act (10 or 11 Geo. VI, C. 13) came into force. By section 17(1) of this Act the jurisdiction of Indian courts to pass decree for dissolution of marriage under the Indian and Colonial Divorce Jurisdiction Act in petitions presented after the aforesaid date was completely taken away. The Indian Independence Act was repealed on the 26th of January, 1950, when the Constitution came into force.

If the jurisdiction conferred on a court by a certain Act is sought to be taken away not by amending that Act but by passing a subsequent Act, and the subsequent Act is later on repealed, the ban so placed on jurisdiction by the subsequent Act is thereby removed and the jurisdiction of the courts rebounds to its original size. This would have ordinarily been the effect of the repeal of the Indian Independence Act. But one finds that the same ban was reimposed by

Article 225 of the Constitution of which the relevant portion runs as follows

> Subject to the provisions of this Constitution and to the provisions of any law of the appropriate Legislature made by virtue of powers conferred on that Legislature by this Constitution the jurisdiction of, and the law administered in any existing High Court and the respective powers of the Judges thereof in relation to the administration of justice in the Court including any power to make rules of court and to regulate the sittings of the court and of members thereof sitting above or in Division Courts shall be the same as immediately before the commencement of this Constitution

By this Article the power of the High Courts has been kept confined within the limits which existed immediately before the commencement of the Constitution Since the Indian High Courts by virtue of section 17 (1) of the Indian Independence Act had ceased to exercise jurisdiction to grant decrees for dissolution of marriages of couples domiciled outside India the same ban continued even after the coming into force of the Constitution But for this provision yet another question could have arisen viz how far the Indian courts could after Independence exercise jurisdiction conferred by the Parliament of another country But this question does not now arise

The position therefore is that the Indian courts have now jurisdiction neither under the Indian Divorce Act nor under the Indian and Colonial Divorce Jurisdiction Act to pass decrees for dissolution of marriages of couples domiciled outside India In the circumstances I am not prepared to follow the decision of the Oudh Chief Court cited above in which PULLAN J took the view that the Indian courts could pass decrees which would be operative within the limits of India

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This decision was given in 1917 i.e. after the amendment of the Indian Divorce Act which had taken place in 1926. PETLIAN, J. remarks that the Indian courts are authorized under the Divorce Act to grant petition which will be valid for all purposes throughout British India in any case where the parties are resident within the jurisdiction of the court and the adultery complained of has been committed in India. The learned Judge has not referred to the provisions of the Indian Divorce Act which conferred such jurisdiction on the Indian courts. He was obviously thinking of law as it stood before amendment. After the amendment the jurisdiction under the Indian Divorce Act had been completely taken away by the amendment introduced in section 2. Therefore I am with utmost respect to the learned Judge responsible for this decision unable to follow it.

Before bringing this discussion to a close reference may also be made to the Indian Matrimonial Causes (War Marriages) Act (XL of 1948). Although the respondent was at one time a Warrant Officer in the Army this Act does not apply to the present case because (1) the respondent had ceased to belong to the Army before his marriage and (2) the marriage was not solemnized during the war period which term has been defined to mean the period commencing from the 3rd September 1939 and ending with the 31st March 1946. Therefore this Act also cannot be invoked in her favour by the petitioner.

In the circumstances I have come to the conclusion that this Court has no jurisdiction to entertain this petition. It is accordingly dismissed. The respondent was not represented by any counsel and was not present on the date of final hearing. I therefore make no order as to costs.

Petition dismissed.

APPELLATE CIVIL

Before Mr Justice Wali Ullah and Mr Justice Bhargava

POKHAN SINGH AND ANOTHER (DEFENDANTS)

v

RADHEY LAL AND OTHERS (PLAINTIFFS)

1952
January 5

United Provinces Court Fees Act, 1870 *s 7 (iv) Schedule I Art 2 (b)—United Provinces Agriculturists Relief Act* 1934 *ss 12 and 23—Application for redemption of usufructuary mortgage—Appeal in High Court—Memorandum of appeal—Payment of court fee—Its method*

The court fees payable on the memorandum of appeal against the decision of a Civil Judge in proceedings on an application under s 12 of the Agriculturists Relief Act is on the amount or value of the subject matter in dispute in appeal which would be the market value of the property in question

Abdul Haq v *Shamshuddin* (1) *Kishen Lal* v *Pradhan Kishen Singh* (2) *and Balram Singh* v *Budhnath* (3) *distinguished Basant Lal* v *Lalta Prasad* (4) followed

First Appeal From Order no 102 of 1947 from an order of K P Bhargava District Judge of Mainpuri dated the 4th March 1947

The facts appear in the judgment

S C Asthana, for the appellants

The Junior Standing Counsel (*Jagdish Swarup*) for the respondents

The judgment of the Court was delivered by—

BHARGAVA, J —This appeal is directed against the order of the learned District Judge of Mainpuri directing the appellants to file court fee to the extent of

(1) 1941 A L J 409
(2) I L R [1946] All 341
(3) I L R [1943] All 863
(4) I L R [1946] All 469

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Bhargava J.

Rs 150 in order to make up the deficiency on their memorandum of appeal filed before the District Judge against the decision of the Civil Judge of Mainpuri in proceedings on an application under section 12 of the Agriculturists Relief Act The Inspector of Stamps and Registration on examination of this memorandum of appeal held the view that the court fee was payable on the principal amount secured by the original mortgage as provided in section 7(ix) of the Court Fees Act In the present case the principal sum secured was Rs 1 000 The learned District Judge accepted this report of the Inspector of Stamps and directed the present appellants to make up the deficiency in court-fee The appellants in this appeal contend that the court fee was not payable on the principal amount secured by the original mortgage but *ad valorem* on the amount at which the appeal was valued in the memorandum of appeal

There is no dispute that the court fee on a memorandum of appeal filed under section 23 of the U P Agriculturists Relief Act 1934 is payable under Article 2 B of Schedule I of the Court Fees Act The amount of proper fee under this item is laid down to be the same as would be leviable on a memorandum of appeal under Article 1 Reference has therefore to be made to Article 1 to determine the court fee payable in this case Article 1 lays down that the court-fee payable on a plaint written statement pleading a set off or counter claim or memorandum of appeal would be determined by the amount or value of the subject matter in dispute This would show that the court fee on the memorandum of appeal filed before the District Judge was to be determined by the amount of the value of the subject matter in dispute in the appeal The Inspector of Stamps whose report was accepted by

the District Judge was of the view that the amount or value of the subject matter in dispute in the appeal in such a case was to be determined with reference to section 7(ix) of the Court Fees Act which lays down

> In suits against a mortgagee for the recovery of the property mortgaged according to the principal money expressed to be secured by the instrument of mortgage

There is no doubt that in a suit for the recovery of the property mortgaged, the value of the subject matter in dispute would have to be artificially fixed in accordance with the principle laid down in section 7(ix) of the Act and may, in a number of cases be different from the market value of the subject matter in dispute In an appeal arising out of such a suit also the valuation would have to be fixed artificially with reference to section 7(ix) of the Court Fees Act because clause (iv) of section 2 of the Court Fees Act enlarges the definition of the word suit so as to include a first or second appeal from a decree in a suit and also a Letters Patent Appeal The word suit itself is not defined in the Court Fees Act and therefore reference has to be made to the Code of Civil Procedure to determine its meaning Under section 26 of the Code every suit is to be instituted by the presentation of a plaint or in such other manner as may be prescribed No rules have been framed under this section prescribing any other manner for the institution of a suit A suit must therefore be deemed to be a proceeding arising on the presentation of a plaint Proceedings under section 12 of the U P Agriculturists Relief Act are instituted not on the presentation of a plaint but on the presentation of an application There can therefore be no doubt that proceedings under section 12 of the U P Agriculturists Relief Act are not a suit Since the proceedings out of which this appeal before the lower court

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PORMAN SINGH v. RADHEY LAL

Bhargava, J.

arose were not a suit, the word suit as used in the Court Fees Act would not include this appeal. If the appeal had arisen out of a suit then the word suit would have included the appeal also for purposes of the application of the Court Fees Act. The present is however a case where the appeal is not from a decree in a suit but from a decree in proceedings on an application. Consequently section 7(ix) which fixes an artificial value for the subject matter in dispute in suits against a mortgagee for the recovery of the property mortgaged cannot apply to this appeal. The decision of the learned District Judge accepting the report of the Inspector of Stamps that the value of the subject matter must be fixed with reference to section 7(ix) of the Court Fees Act is therefore not correct.

It may however be mentioned that even the contention of the appellants that the court fee is payable *ad valorem* on the amount at which the appeal was valued by the appellants is not correct because the appellants do not possess the right to place any arbitrary value on the subject matter in dispute in the appeal. Since the value of the subject matter in dispute in the appeal has to be fixed without reference to any other provisions of the Court Fees Act which only apply to suits or to first or second appeals from decrees in suits this value must be held to be the value of the relief claimed in memorandum of appeal. In the appeal before the learned District Judge the appellants had challenged the right of the respondents to redeem the mortgage. Redemption was allowed by the trial court without any payment. The subject matter in dispute in the appeal was, therefore the right of redemption without payment. This right of redemption translated into the actual form in which it can be executed through the court means the right to get possession over the property mortgaged. In this case therefore the

value of the subject matter in dispute must be held to be the value of the property mortgaged a decree for possession of which had been granted against the appellants and was sought to be set aside in appeal by them The value of the property has also to be determined without any reference to any of the provisions of the Court Fees Act It is only in suits and in appeals arising out of suits that the value of the property, for purposes of court fee is determined in accordance with the provisions of section 7 of the Court Fees Act In the present case, this value will have to be the market value of the property which will have to be determined by the lower court independently of the provisions of the Court Fees Act and without application of the artificial principles which have been laid down under section 7 of the Act for determining the value of the property In this case redemption has been allowed by the trial court without any payment Even in a case where redemption is allowed on payment of a certain sum and the right of redemption is challenged in appeal the court fee will have to be determined on similar principles In such a case the value of the subject matter in dispute in appeal would naturally be the value of the property in respect of which redemption was allowed minus the amount directed to be paid by the mortgagor in order to obtain possession of the property on redemption This would be the subject matter in dispute because if the appeal is allowed the appellants would get the advantage of retaining possession over the mortgaged property but would lose the advantage of receiving the amount of the redemption money decreed

Reference was made by the learned Junior Standing Counsel to the cases of *Abdul Haq* v *Shamshuddin* (1) and *Kishen Lal* v *Pradumian Kishen Singh* (2) in

(1) 1941 A L J 409 (2) I L R [1946] All 341

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Bhargava J.

support of the decision given by the learned District Judge These were however cases in which the appeal was from a decree in a suit and not from a decree in a proceeding under the Agriculturists Relief Act The case of *Bahram Singh* v *Dudh Nath* (1) was also cited but this was a case where the nature of the proceedings under section 12 of the U P Agriculturists Relief Act was determined with reference to the Arbitration Act and not with reference to the Court Fees Act The views expressed in this case are also therefore inapplicable On the other hand, in *Basant Lal* v *Lalta Prasad* (2) it was held that the value of the subject-matter in dispute in an appeal filed under section 23 of the U P Agriculturists Relief Act cannot be determined with reference to section 7(ix) of the Court Fees Act and that the court fees was payable on the amount or value of the subject matter in dispute in the appeal A similar view was taken by a Division Bench of the erstwhile Chief Court of Oudh in *Surjan Singh* v *Nishal Singh* (3) In both these cases it was held that in an appeal under section 23 of the Agriculturists Relief Act the appellant was bound to pay court fee on the amount or value of the subject matter in dispute in appeal and not on the principal amount secured under the mortgage These decisions did not proceed on the interpretation of the word suit as used in the Court Fees Act but on the interpretation of the words the amount or value of the subject matter in dispute as used in Schedule I of the Court Fees Act They are however both in line with the view taken by us above

We would therefore allow the appeal set aside the order of the learned District Judge and send the case back to him with a direction to fix the court fee on the memo-

(1) I L R [1948] All 363 (2) I L R [1946] All 409
(3) A I R 1941 Oudh 147

randum of appeal according to the subject matter in dispute in appeal which would be the market value of the property in respect of which the right of redemption granted by the lower court is sought to be set aside in appeal In the circumstances of this appeal parties must bear their own costs of this appeal

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Appeal allowed

APPELLATE CRIMINAL

Before Mr Justice Dayal and Mr Justice Agarwala

DIBIA

v

STATE

1952 *February 22.*

Criminal Procedure Code, 1898 *s 342—Evidence of eye witnesses and other witnesses of circumstance—Statements of eye witnesses alone sufficient for conviction—Direct evidence put to the accused but not circumstances—Whether accused prejudiced by it*

Where the evidence against an accused consists of circumstantial evidence only it is of the utmost importance that the various circumstances which clinch the issue against him should be put to him and an explanation called for from him But in a case in which there is direct evidence of eye witnesses concerning the commission of offences by an accused and the conviction can be based upon their statemen alone if the direct evidence is put to the accused and the other circumstances are not put to him it cannot be said that the accused has been prejudiced thereby

Tara Singh v State (1) referred to

Criminal Appeal no 888 of 1950 from an order of Shah Ghyas Alam Sessions Judge of Hamirpur dated the 24th August 1950

The facts appear in the judgment

(1) A I R 1951 S C 441

1952

DIBIA
v.
STATE

Jagdish Narain Agarwala, for the appellant

The Assistant Government Advocate (*J R Bhati*) for the respondents

The judgment of the Court was delivered by—

AGARWALA, J —This is an appeal by Dibia who has been convicted under section 302 Indian Penal Code, and sentenced to transportation for life

The appellant was prosecuted for having murdered one Puswa his cousin on the 11th December 1949 at about noon in the house of one Bhikhari in village Todarpur in the district of Hamirpur The prosecution case was that in Baisakh (April) of 1949 the appellant beat his wife whereupon she left his house and came to stay in the house of Puswa deceased and his brother Baddu cousins of the appellant She stayed there for the night and in the morning Baddu persuaded the woman to go back to her husband and calling the appellant made his wife to go with him The accused took his wife out of the village and since then her whereabouts were not known It was not known whether she was alive or dead The appellant then began to give out in the village that Puswa had dishonoured his wife and that therefore he would kill him whenever he would get a chance On the 11th December 1949 at about noon one Sheo Nath was having his hair cut by Babu Lal barber in the house of Bhikhari barber Puswa deceased also went there for his hair cut and shortly thereafter Dibia appellant also went there After Sheo Nath had his hair cut, the hair of Puswa deceased were also cut and while his nails were being trimmed Dibia appellant suddenly took up an axe which was lying there and gave one severe blow on the head of Puswa and ran away He was chased by Sheo Nath but could not be caught Puswa fell down on the ground after getting the blow His

brother Baddu when informed of the incident came to Bhikhari's house and then took Puswa to the police station Korara which is at a distance of seven miles from the village by putting him in his cart On the way to the police station Puswa died

The first information report was lodged the same day at 5 p m The police came to the village in the night and investigation was made Some of the clothes which the deceased was wearing and were blood stained were taken possession of The axe which was also blood-stained was also taken into custody and two pairs of shoes one belonging to the deceased and the other alleged to belong to the appellant were also taken possession of A recovery list was made and the articles were sealed in a bundle with the exception of the shoes belonging to the appellant

The post mortem examination was held the next day at 11 30 a m Two injuries were found on the body of the deceased (1) contused wound $1\frac{1}{2}'' \times \frac{1}{2}'' \times$ skin just above the outer half of the left eye brow (2) incised wound $3\frac{1}{2}'' \times 1'' \times$ brain on the right side of the parietal region of the head 3" above the right ear The brain matter was protruding through the wound and clotted blood was present The skull had been cut through and a circular piece of bone was completely separated The membrane and the brain underneath the injury no 2 were cut through In the opinion of the doctor injury no 1 could be caused by a fall or blunt weapon and injury no 2 was the cause of death of the deceased

The appellant denied that he assaulted the deceased and said that the case was started against him due to enmity He did not however suggest what enmity there was between him and the prosecution witnesses nor was such enmity put to the witnesses when they were cross examined

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INDIA
v.
STATE

Agerwala J.

In support of the prosecution case, three eye witnesses were examined Babu Lal barber who was cutting the hair of Sheo Nath and the deceased Sheo Nath who had his hair cut by Babu Lal and was sitting at the time when the appellant struck the deceased with the axe and Ram Bilas a boy of 14 or 15 years of age who was standing in front of his house which was opposite the house of Bhikari and who saw the appellant running away from the house of Bhikari and being chased by Sheo Nath

Besides these eye witnesses three other witnesses were produced Pirbhu Singh and Bans Gopal, zamindars of the village deposed that Puswa deceased had illicit connection with the wife of the accused Pyare Lal deposed to an extra judicial confession by the accused of having murdered the deceased From the statements of the eye witnesses alone apart from the evidence of other witnesses we are perfectly satisfied that the prosecution story that the appellant struck the deceased with an axe on the head which resulted in the deceased s death is true

It was urged that the examination of the accused was wholly insufficient and consequently he was prejudiced and the trial was vitiated There can be no doubt that the examination of the accused both by the Magistrate and by the Sessions Judge was faulty The Magistrate put the following questions to the accused

> Q —Did you on the 11th December 1949 at about noon, at mauza Todarpur P S Kurari inflict injuries on Puswa son of Mahadeo with the intention of killing him as a result of which he died?
>
> A —No Sir I did not assault him
>
> Q —Why was this case initiated against you?

A—It has been initiated through enmity I shall produce defence in the Sessions Court.'

In the Sessions Court the following questions were put to the accused

Q—Did you make this statement (Ex. P 12), dated the 11th May 1950 before the committing Magistrate and whether it is correct?

A—Yes It is correctly recorded.

Q—Do you want to state anything more?

A—Nothing

Q—Is Ex 3 shoes yours?

A—No It does not belong to me

Q—Do you want to produce defence?

A—No

Section 342 of the Criminal Procedure Code lays down that—

> For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him the court may at any stage of any inquiry or trial without previously warning the accused put such questions to him as the court considers necessary and shall for the purpose aforesaid question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence
>
> * * *
>
> The answers given by the accused may be taken into consideration in such inquiry or trial

It has been held that the courts are bound to observe the provisions of this section and to put to the accused all such circumstances upon which reliance is to be placed by them against the accused The object of the examination of the accused with reference to all the

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circumstances which appear against him is to afford the accused an opportunity of explaining those circumstances The explanation so offered has to be taken into account in determining whether the circumstances are in fact, against the accused and ultimately whether the accused is guilty of the offence with which he is charged If the material circumstances are not put to the accused and his explanation is not called for, there is a danger that injustice may be done As to what circumstances should be put to the accused depends upon the facts of each particular case Where the evidence against the accused consists of circumstantial evidence only it is of the utmost importance that the various circumstances which clinch the issue against him should be put to him and an explanation called for from him But in a case in which there is direct evidence of eye witnesses concerning the commission of the offences by the accused and the conviction can be based upon their statements alone if the direct evidence is put to the accused and the other circumstances are not put to him it cannot be said that the accused has been prejudiced thereby

Our attention has been drawn to a decision of the Supreme Court in *Tara Singh* v *State* (1) We do not think that there is anything in that decision which is in conflict of what we have stated above

In the present case, the substance of the offence which is alleged against the appellant and which was deposed to by the eye witnesses was put to him The reason why the prosecution witnesses were deposing against the accused was also put to him in the second question put by the Magistrate though the names of the witnesses were not specifically mentioned In the

(1) A I R 1951 S C 441

Sessions Court the ownership of the shoes Ex 6 was also put to him The question regarding the motive of the offence illicit connexion of Puswa deceased with the appellant s wife as alleged by the prosecution and the facts that the appellant had beaten his wife six months before the incident, that she had gone to live with the deceased and Baddu P W , that she was returned to the appellant the next morning by Baddu P W that the appellant had taken her out of the village and that her whereabouts were not known were not put to him The extra judicial confession made to Pyare Lal was also not put to him

In our opinion some of these questions should have been put to the appellant But we are unable to say that because of the omission the appellant has been prejudiced in any way We arrive at this conclusion for the reason that in our opinion the statements of the eye witnesses are amply sufficient to justify the conviction of the appellant The worse that can be said for the omission of the material circumstances to be put to the accused is that those circumstances may be omitted from consideration against the accused If after omitting those circumstances the accused s conviction can be maintained it can be said that he has not been prejudiced by the omission In our opinion in the present case even after omitting all the circumstances narrated above which were not put to the accused we are prepared to hold that the appellant did in fact inflict the injury on the head of the deceased with an axe which resulted in his death and consequently the appellant was rightly convicted of having caused the death Causing of a serious injury on a vital part of the body of the deceased with a dangerous weapon like an axe, must necessarily lead to the inference that the

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appellant intended to kill the deceased He was therefore clearly guilty of murder

We accordingly dismiss this appeal and confirm the conviction of and the sentence imposed upon the appellant by the court below

Appeal dismissed

CIVIL REVISION

Before Mr Justice Desai

SUKHNANDAN (PLAINTIFF)

1952
February 28

v

SHANKER AND OTHERS (DEFENDANTS)

United Provinces Debt Redemption Act, 1940, *s 27—United Provinces Agriculturists Relief Act 1934 s 12—Repeal—Its effect*

Section 27 of the Debt Redemption Act unconditionally and for all purposes repeals s 12 of the Agriculturists Relief Act and no mortgage executed after 1940 can be redeemed under it

Bhagwan Das v Gowvom Radhey Lal (1) distinguished

Civil Revision no 268 of 1952 from an order of Shiva Dutta Sharma District Judge Etah dated the 19th September 1951

The facts appear in the judgment

K C Saksena, for the applicant

DESAI, J —This is an application by a plaintiff whose suit under section 12 of the Agriculturists Relief Act for redemption of a mortgage executed on the 24th April 1944, has been dismissed by the appellate court on the

ground that section 12, Agriculturists Relief Act does not apply to redemption of this mortgage Under section 12 Agriculturists Relief Act, a mortgage whether executed before or after the passing of the Act can be redeemed in certain circumstances Section 27 of the Debt Redemption Act has unconditionally and absolutely repealed section 12 of the Agriculturists Relief Act in its application to mortgages made after the commencement of the Debt Redemption Act on the 1st January, 1941 The effect of section 27 Debt Redemption Act is that now no mortgage executed after 1940 can be redeemed under section 12, Agriculturists Relief Act This is the view taken by the appellate court and it is quite correct

The Debt Redemption Act contains a definition of 'loan that definition includes advances made before the 1st June 1940 and excludes advances made after that date It also contains definition of the words 'suit to which this Act applies those words mean any suit or proceeding relating to a loan as defined above In the present case the advance was made in 1944 and therefore it does not amount to a loan within the meaning of the Debt Redemption Act Consequently a suit relating to this advance would not amount to a suit to which this Act applies within the meaning of those words appearing in the Debt Redemption Act Because of this it was argued that section 27 of the Act has not the effect of repealing section 12 Agriculturists Relief Act The argument is unsound and illogical As I said earlier section 27 of the Debt Redemption Act unconditionally and for all purposes repeals section 12 of the Agriculturists Relief Act in relation to loans made after the 1st January 1941 The effect of that section does not at all depend upon whether provisions of the Act are applicable to a particular case or not

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SURHNAN DAS v. SHANKER DEBAI J.

There is nothing in the Act to lend support to the contention that if other provisions of the Act cannot be applied in a given case section 27 also should not be given effect to and section 12 of the Agriculturists Relief Act should not be deemed to have been repealed by it. The words "suit to which this Act applies" have been used in the Act in a special and artificial sense and not in the natural sense. They certainly do not mean a suit to which the provisions of the Act would be applicable; they mean only and not more "a suit relating to a loan" as defined in the Act. If certain provisions of the Act are applied in a "suit to which this Act applies" it is not because of what those words mean naturally but because there are express provisions in the Act itself making themselves applicable to it. The contention of Mr. *K. C. Sakxena* that as the instant suit was not a "suit to which this Act applies" no provision of the Act not even section 27 was applicable and that consequently as regards it there was no repeal of section 12 of the Agriculturists Relief Act is founded on giving the words "suit to which this Act applies" their natural meaning and not the special or artificial meaning given to them by the Act. Those words must be understood only in the artificial meaning given to them in section 2(17). If a suit relates to a "loan" the provisions of the Act will be applied to it; if it relates to an advance which is not a "loan", the provisions of the Act will not be applied to it but it does not follow that effect should not be given to the provisions of section 27 of the Act and that section 12 Agriculturists Relief Act should not be deemed to have been repealed. The simple reason is that giving effect to section 27 does not depend upon giving effect to some other provisions of the Act in a particular case. Effect will not be given to that section only if there are positive words as in section 4 laying down that effect shall not be given to any

provision of the Act The Debt Redemption Act has got to be applied in every case so far as it is applicable If a particular case is not covered by the language used in the Act, its decision will not be governed by the Act but that does not mean that the Act is not given effect to So he provisions of section 27 must have their effect

Bhagwan Das v *Goswami Radhey Lal* (1), cited by Mr *Saksena* has no application to the facts of this case In that case the Full Bench merely interpreted the words The provisions of this Act shall not apply to a suit appearing in section 4 of the Debt Redemp ion Act No such words appear in section 2(9) or (17) of the Debt Redemption Act If a creditor makes a declaration tha he would not proceed against the person or property of an agriculturist the provisions of the Act including those of section 27 will no apply But there are no words laying down that no provision of the Debt Redemp ion Act will apply to a suit relating to an advance made after the 1st June 1940 Certain provisions of the Debt Redemption Act are made applicable to a suit relating to an advance made before the 1st June 1940 They will not apply to a suit relating to an advance made after the 1st June 1940 bu there are no word in the Act to the effect that the other provisions of he Act will not apply in the suit or will not be given effect to in relation to it Therefore no assistance can be had from the decision in that case

I here is no force in this application and it is dismissed

Revision dismissed

(1) I L R [1946] All 102

CIVIL REVISION

Before Mr Justice Bind Basni Prasad and Mr Justice Mukerji

PARASRAM SHUKUL (PLAINTIFF)

1952
August 11

v

BINDESHARI PANDEY AND OTHERS (DEFENDANTS)

Indian Limitation Act, 1908 *s* 19 *Art* 148—*Redemption of mortgage—Deed of compromise—Mention of mortgaged property in it—Whether an acknowledgment —United Provinces Agriculturists Relief Act* 1934 *s* 12—*Application for redemption—Period of limitation—Starting point*

A mention of the mortgaged property in a deed of compromise only for the purpose of description of property and not with an idea of acknowledging the liability of redemption does not amount to an acknowledgment within the meaning of s 19 of the Limitation Act

It is open to a usufructuary mortgagor in an application under s 12 of the Agriculturists Relief Act to ask for the recovery of possession of the mortgaged property without payment of the mortgage money of it has been paid up from the usufruct of the property and the period of limitation for such an application is sixty years from the date when the mortgage money was so satisfied and the right to recover possession accrued

Case law discussed

Civil Revision no 632 of 1948 from a decree of Maheshwari Dayal District Judge of Gorakhpur, dated the 15th May 1948

K L Misra and *C B Misra*, for the applicant

R R Prasad, for the opposite party

The case was at first heard by SAPRU J who referred it to a Bench

The judgment of the Court was delivered by—

BIND BASNI PRASAD J —This is a mortgagor's peti-

tion in revision from the judgment, dated the 15th May 1948, passed by the learned District Judge of Gorakhpur upholding the judgment, dated the 15th April, 1946 given by the learned Sub Divisional Officer of Deoria It arises out of proceedings under section 12 of the United Provinces Agriculturists' Relief Act The relevant facts are as follows

On Jeth Sudi 15 A D 1881 a usufructuary mortgage in respect of an agricultural plot was made by the applicant s ancestors to the opposite parties predecessors On the 1st March 1944 that is to say more than sixty years after the date of the mortgage the application for redemption was filed The applicant contended that in the year 1911 there was an acknowledgment of the mortgage and so the case was saved from the operation of the bar of limitation It was further contended that according to the provisions of section 9 of the United Provinces Debt Redemption Act 1940 there was a fresh start of limitation when that Act came into force viz on the 1st January, 1941 The trial court held that the case was barred by limitation and learned District Judge upheld that order The mortgagor therefore comes in revision

The first question is whether there was an acknowledgment within the meaning of section 19 of the limitation Act It appears that in 1911 there was a partition suit among the members of the mortgagee family being suit no 403 of 1911 in the court of the Munsif of Deoria In the course of that partition suit a compromise was arrived at and *inter alia* there was the following condition in it

> Whatever land is in possession of the plaintiff under the mortgage deed dated Jeth Sudi 15 1288 Fasli, executed by Gur Dutt, father of Jhinguri

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PARASHAM SHUKUL v. BINDESHARI PANDEY

Bind Basni Prasad J.

and Dubri, mortgagors, shall continue to remain in possession of the plaintiffs

The contention on behalf of the petitioner is that this amounts to an acknowledgment under section 19 of the Limitation Act That section provides

> Where before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability a fresh period of limitation shall be computed from the time when the acknowledgment was so signed

Explanation I provides, *inter alia*, that it is not necessary that the acknowledgment should be addressed to the person who seeks to take benefit of it under section 19 Nevertheless, an acknowledgment of liability necessarily implies a conscious acknowledgment of liability Hence in considering whether certain words amount to an acknowledgment of liability it must be seen whether at the time of writing them the writer had in his mind the question as to his liability or whether he was thinking of and referring to some other matter If the mention of the mortgaged property in the deed of compromise was only for the purpose of description of the property as we think it was, and not with the idea of acknowledging the liability of redemption, then in our view it would not amount to an acknowledgment within the meaning of that word as used in section 19 of the Limitation Act

There are some decided cases bearing on this point In *Khali Ram* v *Tarik Ram* (1) a Dakhalnama contained a description of the property purchased by the

(1) A I R 1916 All 201.

defendants predecessor and his signature thereon and in that description there was a reference to the mortgage It was held that the Dakhalnama did not amount to an acknowledgment of liability within the meaning of section 19 of the Limitation Act and the mention of the mortgage was merely for the purpose of description of the property In *Musammat Sham Devi* v *Bhagwat Dayal* (1) there was a sale-deed in which the property purchased was described as subject to a mortgage and only the mortgagee rights were sold It was held that all that the vendor admitted was that he came into possession of the property on the foot of a mortgage No question arose in his mind as to whether the mortgage subsisted or had become time barred The statement in the sale deed by itself did not signify to the mind of the person making it or to anybody else that the maker of the statement thought or believed that he was liable to be redeemed at the date of making the statement Such statement therefore was held not to be an acknowledgment within section 19 In *Nati Ram* v *Roshan Lal* (2), there was an application for sale of a mortgaged property under Order XXI rule 66 of the Code of Civil Procedure and in support of it there was an affidavit to the effect that upon an examination of the registration office the applicant found that there was a mortgage deed of the property of which the sale proclamation was to issue It was held that this statement did not amount to an acknowledgment of liability affixed to the property or personally to the applicant within the meaning of section 19

Learned counsel for the applicant has invited our attention to the Full Bench case reported in *Dara Chand* v *Sarfraz* (3) That was a case in which the defendants had attested as correct the record of rights prepared at a settlement with them of an estate in which they were

(1) A I R 1926 All 353 (2) A I R 1932 All 62
(3) (1876) I L R 1 All 117

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PARASRAM SHUKUL v. BINDESHARI PANDEY

Bind Basdeo Prasad J.

described as mortgagees of the estate, but which did not mention the name of the mortgagor. It was held by the majority of the Judges that there was an acknowledgments of the mortgagor's right to redeem within the meaning of Article 148 Schedule II of Act IX of 1871 the present one. At the settlement the nature of rights is expressly brought into issue. Moreover, the language of section 20 of Act IX of 1871 was quite different. We are of opinion that the principle laid down in this Full Bench case is no applicable to the present case.

For the reasons given above and on the authorities cited above we hold that the recital in the deed of compromise of 1911 does not amount to an acknowledgment within the meaning of section 19 of the Limitation Act of 1908.

The second point argued is that with the commencement of the United Provinces Debt Redemption Act, 1940 a fresh start of limitation was given from the 1st of January, 1941 when the Act came into force. Reliance is placed upon *Ram Prasad* v. *Bishambhar Singh* (1). The view taken in that case was that Article 148 of the Indian Limitation Act 1908, provides two types of suits—(1) for redemption of a mortgage and (2) for the recovery of possession from a mortgagee of immovable property. For the redemption the time from which the period of limitation begins to run is when the right to redeem accrues and for the recovery of possession the time begins to run from the date when the right to recover possession accrues. In the application under section 12 of the Agriculturists Relief Act the relief claimed was for the recovery of possession only. In express terms there was no claim for the redemption of the mortgage. In para 4 of the plaint it was alleged

(1) 1946 A.L.J. 176

that the entire mortgage money had been paid up from the usufruct of the property The right to recover possession of the property in the present case therefore, accrued when the entire mortgage money became paid up from the usufruct of the property Prior to the United Provinces Debt Redemption Act according to the law as it then stood the mortgage money was not satisfied The term in the mortgage deed was that usufruct of the property will go towards the payment of the interest According to this term the usufruct could not be applied towards the repayment of principal When the United Provinces Agriculturists Relief Act 1934 was passed statutory rates of interest were provided and they were to prevail against the contractual rates but those statutory rates according to section 30 of that Act were to be applied only from January 1 1930 Prior to that date the provisions of the Usurious Loans Act 1918 were applicable but prior to 1918 the contractual rates were to prevail It is not shown to us that according to the provisions of the United Provinces Agriculturists Relief Act the mortgage money in the present case became paid up before the commencement of the United Provinces Debt Redemption Act It was in section 9 of the United Provinces Debt Redemption Act that provision was made that interest on a secured debt shall not exceed 4½ per cent per annum simple and in the determination of the amount due under a loan not only the sums actually paid by or on behalf of the debtor but also the net profits realized by the mortgagee or which with the exercise of ordinary diligence might have been realized by him shall be taken into consideration The position in the present case is that the mortgage money was satisfied only when the accounts were taken in accordance with section 9 of the United Provinces Debt Redemption Act 1940 The earliest date on which this section

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PARASRAM SHUKUL v. BINDESHARI PANDEY

Bind Basni Prasad J.

could be applicable was the 1st of January, 1941 Hence it must be taken that on that date the right accrued to the mortgagors in the present case to recover possession of the mortgaged property without the payment of the mortgage money That being so, limitation for a suit for the recovery of possession under Article 148 began to run from the 1st January 1941 In this view of the case the present suit is within time

It has been argued that the present case is not for recovery of possession as contemplated by section 62 of the Transfer of Property Act 1882 but is a case pure and simple for the redemption of a mortgage under section 60 of that Act This is a suit neither under section 60 nor section 62 of the Transfer of Property Act It is an application under section 12 of the United Provinces Agriculturists Relief Act, 1934 A close examination of this section leads us o the conclusion that it embraces within its scope the nature of suits both under sections 60 and 62 of the Transfer of Property Act It starts with the opening words notwithstanding anything contained in section 83 of the Transfer of Property Act 1882 or any contract to the contrary A perusal of that section and the succeeding ones in Chapter III shows that section 12 is an elaboration of section 83 of the Transfer of Property Act Section 83 is wide enough to cover both the types of mortgages—simple and usufructuary for the last paragraph of that section provides for the delivery of possession to the mortgagee Section 60 is a general section declaring the right of redemption of the mortgagors It contemplates al o usufructuary mortgages for clause (*b*) of that section provides that a mortgagor may require the mortgagee in possession to deliver possession of the mortgaged property to him at any time after the principal money has become due and after the mortgage money

has been paid or tendered To a certain extent sections 60 and 62 overlap with each other Compare clause (*b*) of ection 62 with section 60 of the Act But to a certain extent section 62 makes provision for a contingency for which no provision exists in section 60 Section 60 contemplates redemption after payment or tender of the mortgage money It does not contemplate a case where the mortgage money has been paid off from the usufruct of the mortgaged property Clause (I) of section 62 makes provision for this for it provides that a mortgagor may bring a suit for recovery of possession of the mortgaged property where the mortgagee is authorized o pay himself the mortgage money from the rents and profits of the property and the mortgage money has been so paid up Section 60 is a general provision giving the right of redemption to mortgagors in general Section 62 deals specifically with usufructuary mortgages

It may be argued that from section 13 of the United Provinces Agriculturists Relief Act it is apparent that the deposit of the mortgage money is essential for an application under section 12 In *Iqan Husain* v *Babu Ram* (1) it was held that the deposit of money is not essential for an application under section 12 where it is alleged that the mortgage money had been paid up from the rents and profits of the property

The conclusion at which we reach is that in an application under section 12 of the United Provinces Agriculturists Relief Act 1934 it is open to a usufructuary mortgagor to ask for the recovery of possession of the mortgaged property without the payment of the mortgage money if the mortgage money has been paid up from the usufruct of the property and the period of limitation for such an application is sixty years from the date when the mortgage money was so satisfied and

(1) I L R [1950] All 794

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PARASRAM SHUKUL v. BINDESHARI PANDEY

the right to recover possession accrued This is our interpretation of Article 148 of the Limitation Act

The result is that the revision succeeds and it is hereby allowed Parties will bear their own costs throughout Possession will be delivered by the mortgagee in Jeth 1953

Revision allowed

APPELLATE CIVIL

Before Mr Justice Sankar Saran and Mr Justice Brij Mohan Lal

GAURI SHANKER AND SONS (PLAINTIFFS)

1952 *November 21*

v

UNION OF INDIA (DEFENDANT)

Indian Arbitration Act, 1940, s 34—*Suit for breach of contract and compensation for libel—Claim for compensation independent of arbitration agreement—If stay of suit by court below justified*

G, a joint Hindu family firm filed a suit against the Union of India for breach of contract by the East Indian Railway and claimed Rs 3 787 as damages for breach and a sum of rupees one lakh as compensation for libel On an application by the Union of India the Civil Judge stayed the suit under s 34 Arbitration Act It was contended that para 65 of the Publication which provided that In the event of any question or dispute arising under these conditions or in connection with the contract (except as to any matter the decision of which is specially provided for by these conditions) the same shall be referred to the award of an arbitrator shall be barred by the trial of the suit

Held that the claim for damages being covered by para 65 of the said agreement could be referred to arbitration but the claim to recover compensation for libel not falling within the four corners of the agreement was triable only by a court

of law as the claim under tort was totally distinct from contractual dispute arising between the parties

Monro v Bongnor Urban District Council (1) *relied upon* and *Lancester v London Passenger Transport Board* (2) distinguished

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GAURI SHANKAR AND SONS v UNION OF INDIA

BRIJ MOHAN LAL J

First Appeal From Order no 8 of 1952 from an order of Oudh Behari Lal Civil Judge of Moradabad, dated the 29th October 1951

The facts appear in the judgment

A P Pandey, for the appellant

Jagdish Swarup, for the respondent

The judgment of the Court was delivered by—

BRIJ MOHAN LAL, J —This is an appeal by the plaintiff against an order passed by the learned Civil Judge of Moradabad staying under section 34 of the Arbitration Act (X of 1940) a suit instituted by him against the Union of India

The appellant is a joint Hindu family firm carrying on the business of contractors It entered into a contract to supply large quantities of stone boulders and stone chips to the East Indian Railway at railway station Kansrao Some differences arose between the appellant and the railway authorities Certain letters were exchanged between them but they served only to widen the gulf between the two Eventually the railway authorities cancelled the contract removed the appellant s name from the list of approved contractors and circulated that decision to all the Station Masters with the result that the appellant became debarred from securing any contract from the railway administration in future Thereupon it instituted the suit which has given rise to this appeal to recover a sum of Rs 3 787 5 3 as damages for breach of contract and a further sum of Rs 1 00 000 as compensation for libel Its contention

(1) L R [1915] 3 K B 167 (2) [1947] 2 All E R 260

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was that the railway authorities had acted maliciously with a view to harm its reputation and their conduct in circulating their decision to blacklist the appellant amounted to a libel This part of the appellant s case may best be stated by reproducing a port on of para 12 of the plaint It runs as follows

> Further the removal of the name of the plaintiff firm from the list of approved contractors and blacklisting them was also made deliberately to put the plaintiff to disgrace cause loss to them in the matter of their existing contracts damage their professional career injure their reputation as contractors and harass them in carrying out the running contracts with the railway department With that end in view the fact of the plaintiff firm having been blacklisted and removed from the list of approved contractors was circulated and published amongst other parties to bring the plaintiff into contempt and create hatred against them with the intention of ruining plaintiff s business and career as contractors '

Before filing the written statement the respondent moved the learned Civil Judge to stay the proceedings under section 34 of the Arbitration Act It is common ground between the parties that para 65 of the publication entitled The Specifications Instructions and General Conditions of Contract" is applicable to the present case This para runs as follows

> In the event of any question or dispute arising under these conditions or in connection with the contract (except as to any matter the decision of which is specially provided for by these conditions) the same shall be referred to the award of an arbitrator who shall be "

It was contended by the respondent before the Civil Judge, and the same contention is reiterated before us, that this clause barred the trial of the suit by the learned Civil Judge The appellant concedes that the portion of the claim relating to the recovery of a sum of Rs 3 787 5 3 on account of the breach of contract is covered by this agreement But it is contended that the claim for recovery of Rs 1,00,000 as compensation for libel does not fall within the four corners of this agreement

The language of para 65 quoted above makes it clear beyond doubt that a resort to arbitration is to be made only in the event of a dispute arising under these conditions or in connection with the contract This means that if the parties are at variance as to the interpretation of any conditions of the contract or one party asserts that any condition of the contract has been violated and the other denies it or a demand is made by one party for getting some thing done under the terms of the contract which the other party considers to be outside the scope of the contract the dispute has to be referred to arbitration It is only matters relating to contract or the breach thereof that are to be referred to arbitration It was never the intention of the parties that if one of them committed a tort giving rise to claim for compensation in favour of the other the dispute about the tortious act of the guilty party would also be referred to arbitration Parties never contemplated that a claim for defamation brought by one party was to be referred to arbitration instead of being tried by a court of law The whole tenor of the agreement indicates that the parties were at pains to provide for the due fulfilment of contract and were anxious to have such disputes settled through arbitration A claim for compensation for defamation such as has been brought

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by the appellant is totally different from the question of performance of contract of delivery of stone boulders and stone chips It is totally immaterial for the decision of the claim for defamation as to whether the appellant was guilty of breach of contract to supply the aforesaid commodities or whether the railway authorities prevented the appellant firm from performing his part of the contract The claim under tort brought by appellant is totally distinct from the contractual disputes arising between the parties

In this connection reference may be made to the case of *Monro v Bognor Urban District Council* (1) In that case also there was an agreement between the parties that

> If at any time any question dispute or difference shall arise between the council or their engineer and the contractor upon or in relation to or in connection with the contract the matter shall be referred to and determined by the engineer

The contractor sued to avoid the contract on the ground that his consent thereto had been obtained by fraudulent misrepresentation The other party pleaded the aforesaid agreement in bar of the trial It was held that the suit was not barred because the alleged fraudulent misrepresentation was not a dispute upon or in relation to or in connection with the contract On behalf of the respondent reliance was placed on the case of *Lancester v London Passenger Transport Board* (2) In that case there was an agreement to the effect that the defendants would remove the plaintiffs furniture and effects from London to Marlowe and would safely keep and take care of them there The plaintiffs claimed damages on the allegations that the defendants

(1) L R [1915] 3 K B 167 (2) [1947] 2 All E R 260

had been negligent in the discharge of their duties and had caused loss to him There was an arbitration clause and relying on that clause it was contended by the defendants that the dispute should be referred to arbitration The plaintiffs maintained that the allegations of negligence raised an issue of tort and should be tried by court This plea was overruled by the court This authority has been cited by the learned counsel for the respondent in support of the contention that a question of tort also can be referred to arbitration The decision in this case does not lend support to this proposition It was pointed out in the judgment of that case that the terms of the agreement imposed an obligation on the defendants to observe due diligence in the discharge of their contract and that negligence shown by them amounted to a breach of the term of contract It was pointed out that negligence was a negation of due diligence and therefore a breach of contract It was on this ground that the court held that although allegation of negligence *prima facie* gave rise to an issue of tort it raised really no issue other than an issue of breach of contract One important sentence in the judgment at page 268 will bear quotation It runs as follows

> In the present case there is an allegation of diligence in the contract itself pleaded in para 2 of the statement of claim and apparently co extensive with the non contractual obligation of diligence

It will therefore follow that this authority does not support the respondents contention In the circumstances we are of the opinion that the dispute relating to compensation for the alleged defamation does not fall within the purview of the arbitration clause

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It may also be pointed out that section 34 of the Arbitration Act does not make it obligatory on the court to necessarily refer the dispute to arbitration It gives the court a discretion to stay the proceedings in court if it is satisfied that there is no sufficient reason why the matter should not be referred to in accordance with the arbitration agreement In the present case we find that a big claim like that for the recovery of a sum of Rs 1 00 000 has been instituted against the Union of India and serious allegations have been made against responsible public servants The conduct of the Chief Engineer and the Deputy Chief Engineer will have to be examined and the decision of this case may affect the prospects and the pensions of the said officers The arbitrator in the present case will be the Deputy Chief Engineer who will be equal in rank to one of the officials whose conduct will be subject to enquiry and lower in rank than the other official viz the Chief Engineer It does not seem desirable that an enquiry against the then Chief Engineer and the then Deputy Chief Engineer should be entrusted to the hands of the present Deputy Chief Engineer We are of the opinion that even if otherwise the case had been one which fell within the purview of the arbitration agreement we would have refrained from staying the proceedings in court and referring it to arbitration

It was suggested on behalf of the appellant that since the greater portion of the claim is to be tried by the court the portion relating to the breach of contract may as well in the discretion of this Court be directed to be tried by the Civil Judge We are not prepared to accede to this request

It is true that the court has undoubtedly a discretion in the matter but the said discretion is to be used judiciously Once it is conceded that the matter is covered by the arbitration agreement the court should

lend its weight to the enforcement of the agreement, If the parties intended that their disputes of a certain nature should be referred to arbitration the court should not, in the absence of any special reason to the contrary nullify that agreement

The result therefore, is that the appeal is allowed in part The case shall be sent back to the Civil Judge who will try the portion of the claim which relates to the recovery of Rs 1 00 000 as damages for defamation, and will refer the dispute to arbitration in respect of the claim for recovery of Rs 3 787 5 3 The parties shall pay and receive the costs of this appeal in proportion to their failure and success

Appeal allowed in part

APPELLATE CRIMINAL

Before Mr Justice Agarwala and Mr Justice Chaturvedi

SONEY LAL AND ANOTHER

v

STATE

1953
March 9

High Court Rules, 1952 *Chapter XXIII, r 28 if ultra vires*

Rule 28 Chapter XXIII of the Rules of the High Court providing for an application to be made for certificate for leave to appeal to the Supreme Court under Art 132 (1) or Art 134 (1) (*c*) of the Constitution before or at the time of the delivery of judgment in criminal matters is not *ultra vires*

Application for leave to appeal to the Supreme Court in Criminal Appeal no 1004 of 1950

The facts appear in the judgment

S N Misra for the applicants

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SONEY LAL
v.
STATE

The judgment of the Court was delivered by—

AGARWALA, J.—This is an application for leave to appeal to the Supreme Court against a decision of this Court dismissing the appeal of the applicants against their conviction under section 325 read with section 149, Indian Penal Code. The application was not made before, or at the time of the delivery of judgment as required by rule 28 Chapter XXIII of the Rules of the Court but was made later on. The application is liable to be dismissed on the ground that it has not been made in accordance with the aforesaid rule. But it is contended by learned counsel that the rule itself is *ultra vires*. We are not prepared to accept this contention.

Rule 28 Chapter XXIII of the Rules of the Court provides:

> An application for a certificate under article 132(1) or 134(1)(c) of the Constitution in a criminal proceeding shall be made to the Court orally or in writing before or at the time when any judgment, final order or sentence is passed. The court shall thereupon record an order granting or refusing to grant such certificate.

The provision regarding an application being made before any judgment, final order or sentence is passed at first sight would appear to be peculiar and impossible of compliance. But this provision is intended for the convenience of counsel who after the close of the arguments wish to absent themselves from the Court when the judgment is being delivered or if the judgment is reserved when it is to be delivered on a future date, so that they may in that case make an oral request to the Court that in case the case is decided against their clients they may be granted leave to appeal to the Supreme Court. The provision is merely enabling and not

obligatory The application may be made at the time of delivery of judgment No objection can be taken to the provision that the application should be made at the time when any judgment final order or sentence is passed Judgments are delivered in open court and counsel can at once apply to the Court either orally or in writing, whether they want a certificate under Article 132 (1) or 134(1) (c) of the Constitution The bar to an application being made later on is intended to prevent accumulation of work in this Court and waste of the time of the Court in hearing the application later on If the application is made at the time when the judgment is delivered all the facts of the case are in the minds of the judges deciding the case and they can decide the application forthwith without wasting any time We do not think that rule 28 is *ultra vires* of the powers of the court However we have heard learned counsel in support of the application and considered the facts of the case on their merits and have come to the conclusion that there is no force in this application The Court believed the prosecution witnesses and disbelieved the defence The eye witnesses had implicated all the applicants and it was not necessary in the circumstances to examine the individual cases of the applicants because the evidence against each of them was identical The common object of the applicants was found to be the giving of a severe beating to the deceased The inference as to the common object may be deduced from the circumstances appearing in the case It is not necessary and indeed often impossible that there should be direct evidence of common intention The question involved in the case was purely one of fact and we do not think that we will be justified in granting the certificate prayed for by the applicants

The application is rejected

Application rejected

APPELLATE CIVIL

Before the Honourable B Malik, Chief Justice and Mr Justice Bhargava

CHHEDI SAHU AND ANOTHER (DEFENDANTS)

v

1953
May 1

MUSAMMAT SHEORAJI (PLAINTIFF)

United Provinces Debt Redemption Act, 1940, *s* 8—*Order dismissing an application under s* 8—*If appealable*

An order dismissing an application under s 8 of the Debt Redemption Act is not appealable

Badri Prasad v *Shankar Lal* (1) *Ketki Kunwar* v *Ram Sarup* (2) *Sita Ram* v *Raj Kumar Lal* (3) referred to

Letters Patent Appeal no 45 of 1946 against a decision of MATHUR J in Second Appeal No 1655 of 1944 decided on 6th May 1946

The facts appear in the judgment

Jagdish Swarup, for the appellants

Sri Narain Sahai and *K C Saxena* for the respondents

The judgment of the Court was delivered by—

MALIK, C J —This appeal has arisen out of proceedings initiated by an application under section 8 of the United Provinces Debt Redemption Act no XIII of 1940 for amendment of a decree for redemption

The facts in brief are that on the 5th of January 1880 one Janki and his son Kanhai mortgaged a house now in dispute to one Ram Sarup for Rs 299 The mortgage was for possession On 2nd January 1883

(1) I L R [1951] All 466 (2) I L R [1939] All 36
(3) I L R [1946] All 423

the two mortgagors executed a simple mortgage in respect to the same house in favour of the same mortgagee for Rs 299 and stipulated therein that it would not be permissible for the mortgagors to redeem the mortgage of 1880 without paying up the amount due under the simple mortgage of 1883

The mortgagees remained in possession since 1880 Janki and Kanhai both died and Kanhai s heirs who inherited the property transferred the equity of redemption on the 28th of August 1936 to the plaintiffs Mst Sheoraji and Mst Habiban They left a sum of Rs 299 in their hands for redemption of the possessory mortgage of 1880 and stipulated that the transferee would be liable for payment of whatever amount was found due under that mortgage No mention, however was made of the 1883 mortgage When Mst Sheoraji filed a suit for redemption of the mortgage of 1880 the mortgagee relied on the mortgage of 1883 and claimed that before the mortgage of 1880 could be redeemed the plaintiff had to pay the amount due under the mortgage of 1883 as well This plea evidently found favour with the trial court and was affirmed by this Court by an order dated the 5th of November 1942 with the result that the plaintiffs were required to pay Rs 3 942 the amount due under both the mortgages of 1880 and 1883 before the mortgage of 1880 could be redeemed

In the year 1943 the plaintiff filed an application under sections 8 and 9 of the Debt Redemption Act for redemption of interest allowed to the mortgagee and for amendment of the decree This application was dismissed by the learned Munsif on the 18th August, 1943 as in his view the amount was not a loan the liability having been transferred by the original mortgagors to the transferees The defendants had made a declaration

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CHHEDI SAHU v. MUSAMMAT SHORAJI

Iaik C. J.

that they would not proceed against any land agricultural produce or person of the agriculturist but the learned Munsif held that section 4 of the Debt Redemption Act applied only to a case where the mortgage had filed a suit to realize the amount due to him from an agriculturist and not to a suit for redemption filed by an agriculturist. Against the order rejecting the application under section 8 and 9 of the Debt Redemption Act the plaintiff filed an appeal before the learned Civil Judge of Gorakhpur who allowed the appeal on the the 11th April 1944 and reduced the amount which the plaintiffs were required to pay for redemption of the mortgage. On a further appeal to this Court a learned single Judge dismissed the appeal on the 6th of May 1946 but granted to the defendants leave to appeal. The defendants have now filed this appeal.

It is contended on their behalf that the order passed by the learned Munsif on the 18th August 1948 was not an appealable order and neither the learned Civil Judge of Gorakhpur nor the learned single Judge of this Court had any jurisdiction to entertain appeals. Reliance is placed by learned counsel on certain observations made in a Full Bench decision of this Court in *Bodhi Prasad* v. *Shankar Lal* (1). In view of that decision in which several other Full Bench decisions of this Court have been considered it is not necessary for us to discuss the law at any length. That case however has settled the law so far at least as this Court is concerned that an order under section 8 of the Debt Redemption Act refusing to amend a decree is not an order under section 47 of the Code of Civil Procedure. This point was referred to the Full Bench as in the case of *Kedhi Kunwar* v. *Ram Sarup* (2) and other

(1) I.L.R. [1951] All. 406 (2) I.L.R. [1948] All. 35

cases where an application for amendment was made during the pendency of execution proceedings this Court had held that the order for amendment of the decree was an order under section 47 of the Code of Civil Procedure

The decree for redemption was passed on the 5th of November 1942 That decree was no doubt appealable under section 96 of the Code of Civil Procedure The application for amendment of the decree was filed in the year 1943 As the application was dismissed by the learned Munsif the decree was not amended The Debt Redemption Act makes no provision for an appeal against an order dismissing an application under section 8 of the Debt Redemption Act In the case of *Sita Ram v Raj Kumar Lal* (1) the question for decision was slightly different But the law on the point was discussed whether when a decree was amended under section 8 of the Debt Redemption Act an appeal would lie from the amended decree The view expressed by some of the learned Judges was that the amended decree would be appealable but limitation would run from the date of the original decree and an application under section 5 of the Limitation Act might be necessary where the period of limitation for appeal from the decree on the date it was originally passed had expired Some observations were made in *Badri Prasad's* case that the amended decree as such was appealable under section 96 of the Code of Civil Procedure In any case, the question whether the amended decree as such or the original decree as amended is appealable is of mere academic interest Section 8 sub section (2) provides that the amended decree shall bear the same date as the original decree An application under section 5 of the Limitation Act would therefore be required unless the

(1) I L R [1946] All 413

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period of Limitation for appeal from the date of the original decree had not expired

Where, however no amendment has been made and the application under section 8 has failed and has been rejected, the order can be appealable only if there is a law providing for an appeal It is now well settled that an appeal is a creature of Statute and unless a right of appeal is given by some law an order is not appealable We have already said that it has been held by this Court that such an order is not an order under section 47 of the Code of Civil Procedure It is not an order which is appealable under the provisions of section 104 read with Order XLIII, rule 1 of the Code of Civil Procedure There being no provision for appeal the order passed by the learned Munif dismissing the application for amendment was not appealable and no appeal lay to the learned Civil Judge or to the learned single Judge of this Court

Mr *Sri Naran Sahai*, learned counsel for the respondents has asked us to treat this case as a civil revision under section 115 of the Code of Civil Procedure against the order of the learned Munsif dated the 18th of August, 1943 It is doubtful whether a Letters Patent Appeal filed under the permission granted by a learned single Judge of this Court can be treated as a revision against an order passed by the learned Munsif But even if we were to allow this prayer the difficulty would arise that there being no error of jurisdiction in the order of the learned Munsif it being at best an error on a question of law we shall have no jurisdiction under section 115 of the Code to revise the order We therefore do not see any reason for granting this request

The result, therefore is that this appeal is allowed, and the decrees passed by the learned single Judge as

also by the learned Civil Judge of Gorakhpur are set aside The order of the learned Munsif dated the 18th of August, 1943, therefore will remain operative

As the objection as regards jurisdiction was not taken either in the lower appellate court or in this Court we direct the parties to bear their own costs in all the courts

Appeal allowed

CIVIL MISCELLANEOUS

Before the Honourable B Malik, Chief Justice and Mr Justice Bhargava

SRI RAM MAHADEO PRASAD (APPLICANT)

v

COMMISSIONER OF INCOME TAX (OPPOSITE PARTY)

1953
May 8

Indian Income Tax Act, 1922, *s* 10 (2) (*xv*)—*Tour undertaken by proprietors of a firm for procuring business—Hotel charges paid by them—Whether allowable expenditure—Excess interest received from partners of a firm on amounts made to them by firm—If taxable income in the hands of firm*

The hotel charges paid by proprietors of a firm in respect of a tour undertaken for the purposes of procuring business for the firm are not allowable expenditure under s 10 (2) (xv) of the Income Tax Act

Ram Kishan Sundar Lal v *Commissioner of Income tax U P* (1) relied upon

The excess interest received from the partners of a firm on the amounts overdrawn by them after adjustment against payments of interest made to them by the firm is taxable income in the hands of the firm

(1) 19 I T R 324 330

1953

SPLR M MAHADEO PRASAD v COMMISSIONER OF INCOME TAX

Venkadadri Somappa v Narasappally Venkataswami Chetty (1) and *Rm Ar Rm Arunachalam Chettiar v Commissioner of Income tax Madras* (2) distinguished

Miscellaneous Case no 82 of 1949

The facts appear in the judgment

S B L Gaur, for the applicant

S C Das and Jagdish Swarup, for the opposite party

The judgment of the Court was delivered by—

MALIK, C J —This is a reference under section 66(1) of the Indian Income Tax Act made at the instance of the assessee The assessee is a registered firm which carries on business owns house property has income from dividends and other sources During the relevant assessment year the assessee claimed certain deductions as hotel charges incurred by the partners while on tour connected with business The partners of the assessee firm had also lent money to the firm for purposes of carrying on its business and had from time to time borrowed money from it There was a khata in the name of each partner which showed the amount of interest paid by the firm to the partner on the amount borrowed from him and also interest received from the partner on any amount borrowed by him The total amount paid to the partners as interest on amounts borrowed from them was Rs 19 712 while the amount received from the partners as interest on monies borrowed by them was Rs 7 931 The assessee had in his return deducted from its income the sum of Rs 19 712 paid as interest to the partners The Income tax Officer disallowed the hotel charges paid by the partners as also the whole item of Rs 19 712 which he added back to the income The Appellate Assistant Commissioner and the Appellate

(1) 9 I T R 284 (2) (1936) 4 I T R 178

Tribunal directed a sum of Rs 13 412 only to be added back to the return

On the application of the assessee the following two questions have been referred to us for our decision

(1) Whether the hotel charges of the proprietors in respect of a tour undertaken for the purposes of procuring business for the firm are allowable expenditure under section 10(2) (xv) of the Income Tax Act"

(2) Whether the excess interest received from the partners of the firm on the amounts overdrawn by them after adjustment against the payments of interest made to them by the firm is taxable income in the hands of the firm?

As regards the first question it is already covered by our decision in *Ramkishan Sunderlal* v *Commissioner of Income tax, U P* (1) We see no reason to reconsider our view and answer the question in the negative

As regards the second question the assessee was a partnership firm of which the five partners were (1) Jagannath Mahadeo Prasad (2) Kamta Prasad (3) Har Prasad (4) Chunnilal Sohanlal and (5) Gangadin Kedarnath It appears that the first four partners had invested money in the partnership firm on which the firm was paying interest to them The amount of interest paid by the firm to Jagannath Mahadeo Prasad being Rs 12 166 to Kamta Prasad Rs 601 to Har Prasad Rs 3 423 and to Chunnilal Sohanlal Rs 3 522 the total amount thus paid as interest to the partners on the capital borrowed from or invested by them came to Rs 19 712 It appears from the accounts that the partners withdrew or borrowed money from the firm on which they were charged interest by the firm The amount of interest thus paid by Jagannath Mahadeo Prasad was Rs 5 699 Kamta Prasad Rs 1 439 and

(1) 19 I T R 524 546

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SRI RAM MAHADEO PRASAD v. COMMISSIONER OF INCOME TAX

Malik C. J.

Gangadin Kedarnath Rs 793 The total amount of interest received by the firm from the partners for money borrowed by them from the firm was Rs 7 931

The Income tax Officer added back the whole amount of Rs 19 712 paid by the firm to the partners for money borrowed from them without deducting the sum of Rs 7 931, the interest received by the firm from the partners The assessee filed an appeal and the Appellate Assistant Commissioner amended the order by deducting the amounts of Rs 5 699 and Rs 601 only thus holding that a sum of only Rs 13 412 (Rs 19 712 minus Rs 6,300) should have been added back to the return made by the firm The Tribunal upheld the Appellate Assistant Commissioner s order

The Appellate Assistant Commissioner and the Tribunal dealt with the amount received from and paid to each partner separately For example Jagannath Mahadeo Prasad had received Rs 12 166 as interest on money lent by him to the partnership while he had paid Rs 5 699 as interest on amount borrowed by him from the partnership The amount paid to him as interest was adjusted against the amount received from him so that only the difference between Rs 12 166 and Rs 5 699 was directed to be added back Kamta Prasad had lent money to the partnership for which he had been paid Rs 610 as interest He had however, borrowed more than what he had lent to the partnership and had, therefore to pay Rs 1 439 as interest to the partnership The amount of Rs 601 was allowed by the Assistant Commissioner and the Tribunal to be deducted out of Rs 1,439

As regards sums of money which were borrowed from partners and on which the assessee firm paid interest to the partners the provisions of section 19(2) (iii) and 10(4) (*b*) of the Indian Income Tax Act make it perfectly

clear that the amounts could not be deducted in computing profits or gains of the partnership The relevant portion of section 10(2) (iii) is as follows

> (2) such profits or gains shall be computed after making the following allowances, namely
>
> (iii) in respect of capital borrowed for the purposes of the business profession or vocation the amount of the interest paid
>
> Provided that no allowance shall be made in the case of a firm for any interest paid to a partner of the firm,

Again section 10(4) (*b*) provides that—

> nothing in clause (xv) of sub section (2) shall be deemed to authorize (*b*) any allowance in respect of any payment by way of interest salary commission or remuneration made by a firm to any partner of the firm

It is thus clear that the assessee was not entitled to claim that the interest paid by it to its partners for money borrowed from them should be treated as expenditure and should be allowed to be deducted at the time of computation of profits There is however nothing in the Indian Income Tax Act which excludes from the computation of the income of the partnership an amount paid as interest by a partner for money borrowed by him from the partnership

Our attention has been drawn to a decision of the Madras High Court in *Venkadadri Somappa* v *Narasepally Venkataswami Chetty* (1) and reliance has been placed on behalf of the assessee on the observations in that judgment that when the income of a partnership is assessed to tax under the Income Tax Act what is really assessed is no thing less than the income of individual partners and that a partner is entitled to apply

(1) 9 I T R 254

1953

SRI RAM MEHADEO PRASAD v. COMMISSIONER OF INCOME TAX

Mahk. C. J.

under section 48 for the refund of the tax upon his share if his total income for the year is below the taxable minimum. These observations, however, relate to an entirely different set of circumstances. In that case the question was whether the appellant was an agriculturist entitled to claim the benefit of an Act passed for the benefit of agriculturists and a person was not deemed to be an agriculturist if he had been assessed to income tax under proviso (A) to section 3 of Act IV of 1938. The appellant in that case was a partner in a ginning factory and was entitled to one fourth share of the profits. The factory was assessed to income tax for its profits in the year 1937-38. The point raised was whether the appellant could be said to have been assessed to income tax as the factory of which he was a partner had been assessed to income tax.

The case of *Rm. A. Rm. Arunachalam Chettiar* v. *Commissioner of Income tax, Madras* (1) was also relied upon. That was a case in which the question arose whether a partner could undertake the liability to pay the losses incurred by another partner and claim to set it off against his profits from other business. Another point in the case was whether the losses incurred by the other partner could be treated as bad debt in the year in question. While dealing with these points their Lordships of the Judicial Committee said:

> From section 24(2) of the Indian Income Tax Act it would seem that the Indian Legislature thought it necessary to anticipate any possible apprehension that a partnership by being registered as a registered firm within the meaning of section 26 of the Act might be treated as a separate assessee in so absolute a sense as to prevent a partner's share of loss being set off against his individual profits or gains. In their Lordships' opinion whether a

(1) (1936) 4 I.T.R. 178

firm is registered or unregistered partnership does not obstruct or defeat the right of a partner to an adjustment on account of his share of loss in the firm whether the set off be against other profits under the same head of income within the meaning of section 6 of the Act or under a different head (in which case only need recourse be had to section 24(1)

We do not see how these observations help the assessee In neither of the two cases has it been held that it is not possible for a partner to borrow from or lend money to a partnership As a matter of fact section 13 of the Indian Partnership Act (IX of 1932) provides that—

> Subject to contract between the partners
>
> (d) a partner making, for the purposes of the business any payment or advance beyond the amount of capital he has agreed to subscribe is entitled to interest thereon at the rate of six per cent per annum

A partner therefore is entitled to charge interest under the Partnership Act at such rate as may be agreed upon between the partners and in the absence of an agreement six per cent per annum for all sums advanced by him beyond the amount of capital he had agreed to subscribe The provisions of the Income Tax Act quoted above make it clear that the assessee firm is not entitled to claim a deduction for any interest paid by it to its partners If the partner has borrowed money from the partnership it only means that he has diverted to his own personal use a part of the capital which might have been invested for business purposes and has agreed to compensate the partnership by paying interest for it There appears to be no reason why the interest paid by the partner should not be treated as profits made by the partnership

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SHI RAM MAHADEO PRASAD v. COMMISSIONER OF INCOME TAX

In the case before us the Appellate Assistant Commissioner and the Tribunal treated the case of a partner who had lent money to the partnership and had also borrowed money from it as a case of double entry and treated the balance alone as the amount either borrowed by him from or lent by him to the partnership as the case might be and after having made his adjustment they disallowed all interest paid by the partnership to such a partner by reason of the provisions of sections 10(2)(iii) and 10(4)(*b*) quoted above while in the case of a partner who had borrowed more than he had lent the excess amount paid as interest was treated as profits.

The Appellate Assistant Commissioner and the Tribunal thus treated the assessee most fairly and our answer to the second question is in the affirmative.

The assessee must pay the cost of this reference which we assess at Rs 300.

Questions answered.

1954
April 28

FULL BENCH (APPELLATE CIVIL)

*Before the Honourable B. Malik, Mr. Justice Bhargava and Mr. Justice Hari Shanker.**

ONKARLAL AND OTHERS (PLAINTIFFS)

v.

RAM SARUP AND OTHERS (DEFENDANTS)

Court Fees—*Partition Suit and Appeal—Plaintiffs out of possession—Ad valorem court fees to be paid by the plaintiff appellants—Court Fees Act* 1870 (*as amended by U. P. Act XIX of* 1938), *s.* 7 *sub-s.* (*vi-A*) *scope of.*

The plaintiffs brought a partition suit in respect of a house claiming a moiety share therein and alleging joint possession of their half share and paying a court fee on the one-fourth value of the share claimed.

*Sitting at Lucknow.

Held that where on the findings of the two courts below the plaintiffs were out of possession of their share claimed in the partition suit and the plaintiffs have failed to establish their title the plaintiffs should pay ad valorem court fees on the full value of their share before the appeal could be admitted for hearing on merits

The deficiency in court fee of the two courts below must also be made good by the plaintiffs

Case law discussed

Second Appeal no 383 of 1946 from a decree of B N Nigam I C S District Judge of Sitapur, dated the the 30th March 1946

The facts appear in the judgment

[This case was originally heard by KIDWAI, J who to set the controversy at rest referred the matter to a Full Bench for decision by the following referring order]

KIDWAI, J —This report as to court fee arises in a suit for partition The plaintiffs claimed that they were in possession of a portion of the property of which they claimed partition The defendants denied their possession and set up their own possession The trial Court held that the plaintiffs were not in possession It also decided other points against the plaintiffs and dismissed their suit There was an appeal but that was also dismissed by the learned District Judge of Sitapur on the same ground The plaintiffs have now come up in second appeal and they have again raised the question of possession The office reports that since it has been found by the two courts below that the plaintiffs are not in possession and it is also a fact that their title to co sharership of the property is denied therefore they should be made to pay *ad valorem* court fee on the full value of their share and not only on one quarter of the value as they have done in the courts below The learned advocate for the appellants relies on *Parmeshwar*

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Din v. Har Govind Prasad (1), in which it has been held that when the same matter is still involved in the appeal the appellant cannot be called upon to make good any deficiency in court fee till the decision of that matter. On the other hand the learned Additional Junior Standing Counsel relied on *Muneshwar Bux v. Har Prasad* (2) for the contrary proposition. The last mentioned case is no doubt in conflict with the first mentioned decision and does not settle the matter. Since this conflict exists between two Bench decisions and there is no decision which may be held to have settled the point which is of considerable importance I consider that this matter should be placed before a larger Bench consisting of at least three Judges to set the controversy at rest. The papers may accordingly be placed before the Hon'ble the Chief Justice for the constitution of such a Bench.

Ram Bharosey Lal and Rajeshwari Prasad, for the appellant.

The Junior Standing Counsel (*B. N. Roy*), for the State.

HARI SHANKAR, J.:—This is a court fee matter in a second appeal by the plaintiffs.

In order to appreciate the question of court fee raised before us it is necessary to state a few facts. The plaintiffs brought a partition suit in respect of a house in which they claimed a moiety share. It was alleged in the plaint that the plaintiffs were in joint possession of their half share ever since its purchase on the 11th January 1937 from the father of the defendants for a sum of Rs. 1,500.

The above suit was contested by the defendants-respondents. They denied the fact that the plaintiffs were co-owners of the house. They further denied that the plaintiffs were in possession of the share claimed by

(1) (1949) I.L.R. 14 Luck. 346. (2) 1945 O.W.N. 114.

them The question whether the plaintiffs were in joint possession of the house was the subject matter of issue no 3, which ran thus

Are the plaintiffs in possession of the house ?

If not what is the effect?

Both sides led evidence on this issue On the evidence produced in the case the trial court held that the plaintiffs had not established their joint possession over the house

On the question of title also the trial court held that the plaintiffs had failed to establish that they were co owners in the property in suit

Dissatisfied with the decision of the trial court the plaintiffs went in appeal before the District Judge of Sitapur who dismissed the appeal and affirmed the findings of the trial court

The plaintiffs have now come up in second appeal On the presentation of the memorandum of appeal the Stamp Reporter of this Court made a report about the deficiency in court fee not only in this Court but in the two courts below also In the report it was pointed out on the basis of the findings of the two courts below that as the plaintiffs were not in joint possession of the house and as the title to the house was also denied the case falls under the second part of section (vi A) of the court fees Act which requires the payment of *ad valorem* court fee on the full value of the share claimed Since the plaintiffs had paid court fee on one fourth value of the share claimed under the first part of sub section (vi A) of section 7 a deficiency of Rs 414 6 was found due against the plaintiffs as the total deficiency payable by them in the three courts

When the report was placed before the Taxing Judge of this Court it was urged on behalf of the appellants

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that the question whether the plaintiff were in joint possession of the share was still an open question to be decided in second appeal and until that question was decided the plaintiffs could not be asked to pay *ad valorem* court fee on the full value of the plaintiffs share. In support of this contention the appellants relied on the case of *Parmeshwar Din* v. *Hargobind Prasad* (1). Learned counsel for the State however relied on a later decision in *Maneshwar Bakhsh* v. *Har Prasad* (2) for the contrary proposition that where on the finding of the two court below it appears that the plaintiff was out of possession of the share claimed in a partition suit he should be asked to pay *ad valorem* court fee on the full value of his share before the appeal could be admitted for hearing on merits. In view of the general importance of the question the Taxing Judge referred the matter for consideration by a Full Bench.

It is not disputed that the question of court fee in this partition suit is governed by sub section (vi A) of section 7 on the Court Fees Act which was inserted by section 11 of the U. P. Amending Act XIX of 1938 which runs thus:

> 7. The amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows:
>
> (vi A) In suits for partition according to one quarter of the value of the plaintiffs share of the property
>
> and according to the full value of such share if on the date of presenting the plaint the plaintiff is out of possession of the property of which he claims to be a co parcener or co owner and his claim to be a coparcener or co owner on such date is denied

(1) (1880) I.L.R. 14 Luck. 340. (2) 1946 O.W.N. 114.

Explanation—The value of the property for the purposes of this sub section shall be the market value which in the case of immovable property shall be deemed to be the value as computed in accordance with sub section (vi) (A) or (B) as the case may be

The aforesaid sub section contemplates two modes of valuation If in a partition suit the plaintiff is in joint possession of his share in the property he has to pay a court fee equivalent to one fourth of the value of the plaintiff's share If however the plaintiff is out of possession of the property and if his claim to be a co sharer or his title as coparcener or co owner is denied, then the plaintiff is required to pay court fee on the full value of his share It is not disputed that if this case falls under the second part then the plaintiffs have to pay the court fee on the full value of their share which is Rs 1 500

Learned counsel for the appellants has challenged the correctness of the report of the Stamp Reporter His contention is that the question relating to the payment of court fee must be governed by the allegations and prayers in the plaint and on the allegations made in the plaint the court fee is payable on the basis of the first part of sub section (vi A) of section 7 In support of this contention learned counsel for the appellants relied upon the case of *Ala Ram v Jagan Nath* (1) where it was held that in determining the provisions of the Court Fees Act applicable to a particular suit the allegations made by the plaintiff alone must be considered and the pleas raised by the defendant do not affect the question The decision arrived at in the aforementioned Lahore case cannot be of much assistance as in the case before us we have to consider the applicability of the particular

(1) A I R 1934 Lah 553

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provision in the Court Fees Act which was inserted by the U. P. Amending Act XIX of 1938.

As regards the general rule that the courts must base their decision as to the court fee payable on the allegations and prayers in the plaint it seems to us that there is a certain amount of misapprehension as to the true meaning and real scope of this general rule. It is therefore necessary to consider the real import of the general rule that the court fee should be made payable on the allegations and prayers as contained in the plaint.

An examination of the law of court fee will reveal that when a plaint is presented two questions ordinarily arise for scrutiny. In the first place the plaint has to be examined to find out the real nature of the suit, that is to say, as to under which of the several categories of suits mentioned in the Court Fees Act the particular suit falls. This is what is generally called the classification of the suit in the first instance. After this is done the next stage is to find out the relevant provision in the Court Fees Act for the purpose of computation of court fees. No difficulty arises in those classes of cases where a fixed fee has been provided in Schedule II, but if a suit is of the category where *ad valorem* court fee is leviable, as in the present case, the court will proceed to value the subject matter according to the rules for computation, as set out in the various parts of section 7.

Coming back to the contention of learned counsel for the appellants, the general rule that the court must base its decision as to the court fee payable on the allegations and prayers in the plaint is correct only to this extent that the general rule is invoked primarily for the purposes of classification of suit, in other words, in order to find out the nature of the suit and the category it belongs to, the court must examine

the allegations and reliefs claimed in the suit for the simple reason that it is the allegations made in the plaint which determine the nature of the suit. In making this classification about the category of the suit it is not permissible to call in aid the allegations made in the written statement. [See *Safdar Husain* v. *Mt. Achchan Begum* (1).] The general principle which is a rule of prudence is followed strictly in the matter of determining the category of the suit and for that purpose attention must be confined within the four corners of the allegations in the plaint. Even in the matter of classifying the suit the general rule is ignored where it appears on the construction of the plaint that the real relief sought is something different than what is asked for in the disguished form. The court must then intervene and ignore the ostensible form and language adopted in the plaint.

In the matter of computation of court fee the aforesaid general principle cannot have so wide a scope as it has in determining the nature of the suit. After the category of the suit has been ascertained the court has to find out whether the plaintiff has correctly valued the relief for purposes of court fees in the manner laid down in section 7 of the Court Fees Act. This process also involves the examination of the plaint allegations and if there is nothing to indicate otherwise the plaintiff's valuation *prima facie* is accepted as correct. Ordinarily the court would accept court fee paid in the first instance as correct but if it transpires subsequently that an allegation of fact on the basis of which the court fee was computed is not correct then it is within the power of the court to demand additional court fee before the judgment is pronounced. Section 6 of the Court Fees Act directs that no document

(1) A.I.R. 1948 Oudh 456.

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(which term includes a plaint) which is not properly stamped shall be received unless it bears proper court fee paid according to the provisions of the Court Fees Act. It was with a view to recognise the power of a court to realize additional court fee that the Legislature thought it proper to enact Order VII rule 11 (c) and also section 149 of the Code of Civil Procedure. Take for instance a case in which the plaintiff sues for possession of a house which he values at Rs. 500. If the defendant contests this valuation the court must first determine the market value of the house in the manner laid down in section 10 of the Court Fees Act and if it comes to the conclusion that the market value of the house for the purpose of court fee is Rs. 1,000 it has the power to demand the additional court fee which if not paid would entitle the court to reject the plaint. It is thus evident that the general rule that the payment of the court fee must abide by the allegation in the plaint in all circumstances cannot be accepted as correct. Where the court has reason to think on the material placed before it that the plaintiff has made false or incorrect allegations with a view to avoid payment of court fee the court has power to intervene and realize court fee at any stage of the proceedings in the case. If however the mistake is not detected by the trial court and also by the appellate court the power of the High Court to require payment of the court fees that should have been paid in the lower Courts is expressly recognised in the second part of section 12 of the Court Fees Act. It is therefore not correct to say that even in the matter of computation of court fee plaint allegations should be accepted as the last word on the question of payment of court fee.

Coming to the case before us the allegations in the plaint show that it is a partition suit which is governed by sub section (vi A) of section 7 of the Court Fees Act

for computing the proper court fee The court fee paid by the plaintiffs was accepted as correct because the plaintiffs had asserted in the plaint that they were in joint possession of the property to the extent of their share In the initial stage it could not be said with any certainty whether the allegation was false or correct The defendants having denied this assertion of the plaintiffs a specific issue on the question of joint possession of the plaintiffs was framed in the case The Court after evidence was gone into recorded a finding that the plaintiffs were not in joint possession of the property In view of this finding it was open to the first court to demand court fee under the second part of sub section (vi A) of section 7 of the Court Fees Act before pronouncing final orders in the case It appears however that it escaped the notice of trial court to demand court fee under the second portion of the aforesaid sub section When the matter went up before the first appellate Court it appears that the point that the plaintiffs should be asked to pay the court fee under the latter part of sub section (vi A) was not pointed out and therefore no court fee was charged in that court also In view of the findings of the two courts below it cannot be disputed for the purposes of court fee that the plaintiffs were out of possession of their share at the date when they brought the suit and as such the court fee should have been levied according to the valuation prescribed under the latter part of sub section (vi A) of section 7

Learned counsel for the appellants has relied upon the general proposition of law that possession of one co sharer is in the eye of law the possession of all the co sharers in the property Even this presumption is not available to the plaintiffs as the two courts below have found against them on the question of their title to a share in the house We do not, however consider it proper to enter into this question at this stage

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because this will be a matter for consideration when the the appeal comes up for hearing on merits At present for the purposes of court fees, we must accept the finding of the two courts below which is to the effect that the plaintiffs were out of possession of their share at the date when the suit was brought

Now remains the second question whether the deficiency in court fee as reported by the office can be demanded before the appeal is decided It has been urged before us that the question whether the plaintiffs were in joint possession of their share or not at the date of the suit is a question which will have to be decided in second appeal and until the appeal is decided on merit the appellants should not be asked to pay the additional court fees We find it difficult to accept this contention Learned counsel for the appellants has relied on the following observation in *Parmeshri Din* v *Hargobind Prasad* (1)

> The plaintiff was not liable to make good the alleged deficiency in the court fee until the question of joint possession was not finally settled in appeal

It may be pointed out with advantage that the aforesaid case was decided before the Court Fee Act was drastically amended by the U P Amending Act XIX of 1938 and as such the above remarks cannot be of any assistance in deciding the question before us

The point which has been raised in this case came up for decision before a Bench in *Muneshwar Bux* v *Har Prasad* (2) The facts in that case were on all fours with the facts of this case It was argued that the realization of the deficiency should be postponed as the question whether the plaintiffs were in joint possession or not was a matter to be decided in the appeal The

(1) (1930) I L R 14 Lack 346 (2) 1945 O W N 114

Learned Judges rejected the contention and made the following observations

> The decision of the lower court on the question of possession for the purpose of court fee under the circumstances must be regarded as *prima facie* correct and the appellants must pay the deficiency according to the full value of the share which they claim on partition

The appellants were thereupon called to make up the deficiency on the memorandum of appeal In our view the law was correctly laid down in this decision

The prohibition against the reception of a document which is not properly stamped is contained in sections 4 and 6 of the Court Fees Act The result of this prohibition is that unless a plaint or a memorandum of appeal is properly stamped no court can proceed to dispose of the case on merits To enable the court to consider the appeal on merits the memorandum of appeal must be a document which is properly stamped It follows therefore that the question whether a memorandum of appeal is properly stamped or not must be decided first before the appellant can claim a hearing on merit Apart from this the levy of court fee is a sort of tax which the State requires a litigant to pay before his cause can be heard and decided If the contention of the appellants is accepted then it would amount to giving a decision on merits without payment of proper court fee We might usefully refer to clause (3) of section 6 of the Court Fee Act which runs thus

> If a question of deficiency in court fees in respect of any plaint or memorandum of appeal is raised by an officer mentioned in section 24 A

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the court shall, before proceeding further with the suit or appeal record a finding whether the court fee paid is sufficient or not If the court finds that the court fee paid is insufficient it shall call upon the plaintiff or the appellant as the case may be to make good the deficiency within such time as it may fix and in case of default shall reject the plaint or memorandum of appeal

This clause was inserted with a view to make it clear that it was the bounden duty of courts to decide all questions of court fee as a preliminary question before entering into the merits of the case The question of court fee therefore has to be decided on the basis of facts as they stand at the time when the memorandum of appeal is filed in the court The decision of the two courts below that the plaintiffs were never in joint possession must be accepted as correct for levying the proper court fee and in view of the finding of the courts below it cannot be doubted that the case is covered by the second part of sub section (vi A) of section 7 The report relating to deficiency is correct and the deficiency must be made good first before the memorandum of appeal can be admitted

We therefore accept the report of the Stamp Reporter and direct the appellants to pay the deficiency in court fee of Rs 414 6 within three months from today If the deficiency is not made good within the time allowed, the memorandum of appeal shall stand rejected

BHARGAVA J —I have had the benefit of reading the judgment of my brother HARI SHANKAR, J and I entirely agree with him but I would like to add a few comments on the question of applying the general rule that the courts must base their decision as to the court fee payable on the allegations and prayers in the plaint It is obvious that this general rule can only be applied

in cases where the language of the Court Fees Act does not expressly or impliedly require that beside the allegations and prayers in the plaint, the court fee should be determined on other considerations also. Section 7(vi A) of the Court Fees Act which prescribes the court fee in suits for partition has two parts.

There is the general rule that the court fee is payable according to one fourth of the value of the plaintiff's share of property but this is qualified by the second specific rule that the court fee is payable according to the full value of such share if on the date of presenting the plaint, the plaintiff is out of possession of the property of which he claims to be a coparcener or co owner and his claim to be coparcener or co owner on such date is denied. To apply this second alternative courts have to go into the question whether the plaintiff is or is not out of possession on the date of presenting the plaint and whether his claim to be a coparcener or co owner on such date is denied. It is obvious that the legislature could not have intended that on these points the plea taken by the plaintiff must be accepted finally for purpose of working out the valuation to determine the court fee payable because if that were so the plaintiff in every case could make this clause ineffective by pleading in the plaint that he is in possession or by alleging that his claim to be a coparcener or coowner is not denied. The language used clearly indicates that it is not the plaintiff's assertion on these points which must be accepted. In such cases therefore though the court fee may initially be accepted as correct according to the allegations made by the plaintiff in the plaint the court is required to revise its opinion and ask for the requisite court fee under the second part of that clause on coming to the view that the plaintiff is out of possession of the property and that

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claim to be coparcener or coowner is denied The general rule of ascertaining the valuation, for purposes of court fee from the allegations and prayer in the plaint must, therefore, in such cases be modified and I agree with my brother HARI SHANKAR, J about the procedure that the courts should adopt in order to do so

MALIK, C J —I agree and have nothing to add

Order accordingly

CIVIL MISCELLANEOUS

Before the Honourable B Malik, Chief Justice and Mr Justice Bhargava

SINGH ENGINEERING WORKS, KANPUR
(APPLICANT)

v

COMMISSIONER OF INCOME TAX
(OPPOSITE PARTY)

1953
February 4

Indian Income Tax Act, 1922, *s* 31(3) *(b) order passed by Appellate Assistant Commissioner under Income tax Officer if bound to follow the directions given by the Commissioner in making fresh assessment—Previous notice issued by Income tax Officer—Whether becomes inoperative and fresh notice necessary to issue— Best judgment assessment by an Income tax Officer—Interference by higher courts—Principle to be followed*

When an order is passed by the Appellate Assistant Commissioner under sub-cl (*b*) of sub s (3) of s 31 of the Income Tax Act setting aside the original assessment an Income tax Officer is bound to proceed in accordance with the directions given by the Appellate Assistant Commissioner and any material on the record properly admitted and which had not been held to be inadmissible can be taken into consideration in making the fresh assessment

A notice issued by the Income tax Officer in the first assessment proceedings upon an assessee to explain his [illegible] not become inoperative and the Income tax Officer accordingly bound to issue a fresh notice calling for a fresh explanation from the assessee

Interference by the appellate or other higher courts with the exercise of the best judgment by an Income tax Officer must be on the same principles on which appellate courts usually interfere with the exercise of discretion by a trial court

Case law discussed

Civil Miscellaneous no 300 of 1949

The facts appear in the judgment

G S Pathak for the applicant

The Junior Standing Counsel (*Jagdish Swarup*) for the opposite party

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The judgment of the Court was delivered by—

MALIK, C. J. — This is a reference under section 66 (1) of the Indian Income Tax Act. The following three questions have been referred to this Court for our decision:

Q. 1.—Whether effect of an order passed by the Appellate Assistant Commissioner under sub clause (*b*) of sub section (3) of section 31 of the Income Tax Act setting aside the original assessment is to set aside the entire assessment proceedings that had taken place before the Income tax Officer and when the Income tax Officer restarts the assessment he is bound to start afresh all the proceedings under the Income Tax Act from the stage of filing of the return and to treat all the evidence existing on the original assessment as non existent?

Q. 2.—Whether in the circumstances set forth in question no. 1, the notice issued by the Income tax Officer in the first assessment proceedings calling upon the appellant to explain certain cash credits in its accounts ceases to be operative for the re assessment which has been decided to be made and the Income tax Officer is bound to issue a fresh notice in that respect and to call for a fresh explanation from the assessee?

Q. 3.—Whether there was any material before the Tribunal to justify the finding that the cash credits in question represented the assessee's income liable to assessment?

The first two questions are not very happily worded. As a matter of fact the questions suggested by the assessee were clearer.

The assessee is a Hindu undivided family carrying on the business of the manufacture and sale of iron bars, strips etc. in Kanpur. The assessee has income from house property as also from business carried on

in the name of Singh Engineering Works and Singh plate mills etc Usual notices under section 22 of the Indian Income Tax Act were issued requiring the assessee to produce its account books for the relevant account period, i e 1st April 1941 to 31st March 1942 The assessee however produced account books only from 12th September 1941 that is the accounts from 1st April 1941 to 11th September, 1941 were not produced The assessee gave some explanation that the account books had been taken away by one Amar Singh, an employee but that explanation was not accepted Notice to produce those books was issued and ultimately on failure to comply with the notice the Income tax Officer proceeded to make the assessment under section 23 (4) of the Indian Income Tax Act The assessee had filed a return showing an income of Rs 2 625 from house property and Rs 72 725 from business The Income tax Officer however made a best judgment assessment under section 23 (4) of the Act on the basis of an income of Rs 4 65 150 Deducting Rs 2 59 361 for purposes of excess profits tax liability the net assessable income according to the Income tax Officer was Rs 2 05 789 This order was dated 29th March 1944 There was an appeal filed in the court of the Appellate Assistant Commissioner of Income tax and on 27th March 1945 the Appellate Assistant Commissioner set aside the order of the Income tax Officer and directed the latter to make a fresh assessment after proper enquiries The Income tax Officer proceeded thereafter to make fresh enquiries in accordance with the directions given by the Appellate Assistant Commissioner of Income tax and came to the conclusion that the total profits came to Rs 3 33 981 and deducting therefrom Rs 1 71 915 for excess profits tax liability the assessable profits were held to be Rs 1 62 066 An appeal was filed against the order before the Appellate Assistant

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Malik, C J

Commissioner of Income tax and then before the Income-tax Appellate Tribunal but the assessment order of the Income tax Officer was affirmed

Sri *Pathak* on behalf of the assessee has however, explained that it was not his contention that the Income tax Officer did not make any fresh enquiries as directed by the Appellate Assistant Commissioner, or, that his client was deprived of any opportunity to place before the Income tax Officer such material as he might have considered relevant He contended that his arguments were based on a pure question of law that after the Appellate Assistant Commissioner of Income tax had set aside the assessment order and has sent the case back to the Income tax Officer the entire proceedings subsequent to the filing of the return under section 22 of the Indian Income Tax Act should be deemed to have been set aside and fresh proceedings should have been started Our attention has been drawn to section 31 (3) (*b*) of the Indian Income Tax Act the relevant portion of which runs as follows

> 31 (3) In disposing of an appeal the Appellate Assistant Commissioner may in the case of an order of assessment (in) *** *** (*b*) set aside the assessment and direct the Income tax Officer to make a fresh assessment after making such further inquiry as the Income tax Officer thinks fit or the Appellate Assistant Commissioner may direct and the Income tax Officer shall thereupon proceed to make such fresh assessment and determine where necessary the amount of tax payable on the basis of such fresh assessment

In the case before us the only direction given by the Appellate Assistant Commissioner of Income tax was that the Income tax Officer shall make a fresh assessment after proper enquiries As we have already said it is

not suggested that proper enquiries were not made and the learned counsel has not been able to explain on what basis he urges that the material which was on the record at the time when the assessment which had been set aside was made must be treated as non existent and must not be taken into consideration The Appellate Assistant Commissioner had pointed out that certain photographic impressions on which the Income tax Officer had relied were not admissible in evidence for want of proof The Income tax Officer was no doubt not entitled to utilize that material without further proof and it is not suggested that he did There is no reason why the other evidence which was properly admitted and placed on the record and to which no exception had been taken should be deemed to be non existent Therefore our answer to the first question is that the Income tax Officer is bound to proceed in accordance with the directions given by the Appellate Assistant Commissioner of Income tax and any material on the record properly admitted and which had not been held to be inadmissible can be taken into consideration in making the fresh assessment

As regards the second question it is not suggested that the assessee had no opportunity or was denied the opportunity to give any explanation What is urged is that fresh notice should have been given and a fresh explanation called for We do not think that any such duty was imposed on the Income tax Officer under the order of the Appellate Assistant Commissioner The assessee knew of the proceedings before the Income tax Officer the assessee had been asked to explain the absence of the account books for a part of the period the assessee had furnished an explanation the assessee knew that the explanation furnished had been rejected the assessee, no doubt

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could again press for its acceptance and if the assessee wished to furnish any further explanation there was nothing to prevent the assessee from doing so It is not suggested that the Income tax Officer refused to take into consideration any explanation offered by the assessee We see no reason for holding that the Income tax Officer was bound to issue a fresh notice calling for a fresh explanation when the assessee had already offered an explanation before and did not offer any other explanation afterwards Our answer to the second question is that the previous notice issued by the Income tax Officer does not become inoperative and the Income tax Officer is not bound to issue a fresh notice calling for a fresh explanation from the assessee

Coming to the third question we have already said that the Income tax Officer had made the assessment under section 23 (4) of the Indian Income Tax Act The Income tax Officer had set out the basis on which he had made the best judgment assessment The matter was taken up before the Appellate Assistant Commissioner of Income tax who in a very well considered order gave reasons for upholding the conclusions arrived at by the Income tax Officer The reasons given by him are mentioned in the third paragraph of his order dated the 22nd of February 1947 In making his best judgment assessment the Income tax Officer had taken into account a sum of Rs 50 000 which was an unexplained deposit in the proprietor s account A bank draft for Rs 50 000 drawn on the Central Bank of India Kanpur, was sent from Amritsar and it was suggested by the assessee that this sum of Rs 50 000 was not really any trade receipt but was a part of the withdrawals made in the previous financial year which had remained unspent in its hands and which was transmitted from Amritsar to Kanpur The

Income tax Officer and the Appellate Assistant Commissioner of Income tax for reasons given by them considered it reasonable that the amount should be considered taxable income of the assessee The explanation given by the assessee was not accepted either by the Income tax Officer or by the Appellate Assistant Commissioner When the case came up before the Income tax Appellate Tribunal, the line taken by the learned counsel for the assessee was that he admitted and did not challenge the other items of income and thus conceded that the Income tax Officer was right in his estimate that profits to the extent of Rs 2 83 981 out of Rs 3 33 981 had been made out as regards the sum of Rs 40 000 he challenged the findings of the Income tax Officer and the Appellate Assistant Commissioner and urged that the explanation given by the assessee should have been accepted The Tribunal rejected this contention for practically the same reasons for which the Appellate Assistant Commissioner had rejected it Those reasons if we might say were very cogent The assessee had pointed out that in the previous account year a sum of Rs 1 13 746 had been withdrawn in the course of that year against deposits amounting to Rs 6 093 The balance according to the assessee was left in its hands and out of that balance it had transmitted from Amritsar to Kanpur the sum of Rs 50 000 on 14th February 1942 It however appears that out of Rs 1 13 746 withdrawn in the previous year a sum of Rs 81 875 had been withdrawn on the 26th of March 1941 The assessee had suggested that the assessee wanted to buy a house in Mussoorie but as the transaction fell through the amount remained in assessee's hands and ultimately the assessee decided to build a house at Amritsar and after having constructed that house out of the balance left over a sum of Rs 50 000 was transmitted to Kanpur

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The Income tax Appellate Tribunal pointed out that if the assessee had this large sum of money in hand there was no reason why the assessee should have with drawn smaller sums of money between the dates 26th March, 1941 and 14th February 1942 The Tribunal has further pointed out that, during that period, the assessee purchased a house in Mussoorie for Rs 40 000 and withdrew that amount for that purpose and that no accounts had been furnished about the construction of any house at Amritsar For these and other reasons given by the Tribunal, it rejected the explanation of the assessee After having rejected the explanation the Tribunal said

> The fact therefore remains that the onus which lay on the appellant of proving the source of the cash credits and connecting them with the withdrawal has not been discharged by him We, therefore hold that he had failed to account for the cash credits of Rs 50 000 appearing in his account It follows as a presumption of fact that they represent the profits outside his books of account We, therefore agree with the Income tax authorities in the addition of this amount for the purpose of computation of the assessable income of the appellant

In deciding the case in the manner in which it did the Tribunal followed the same line as was followed by the Court of Appeal in *Stoneleigh Products Ltd* v *Dodd (H M Inspector of Taxes)*(1) where the assessee company showed in its books of account an amount of £1 392 12s 7d standing to the credit of Director s Current Account the director in question being Mr Alfred Lee who explained how he came by that money which

(1) 30 Tax Cases 1

he said he had advanced to the company His explanation was found to be false and the learned Judge (ATKINSON, J) observed as follows

> The Commissioners therefore, had the relevant contentions before them, and said We do not believe Mr Lee and we considered the appellant company had not discharged the onus that lay upon it of displacing the assessment I am bound to take the view—I cannot escape from it that they must have directed their attention to the two issues which had been raised by the appellant company They must have considered whether these sums were lent to the company or whether they were not, and I am quite satisfied that they came to the conclusion that the alleged loans were wholly fictitious They considered the whole story was untrue and that the £1 800 was really part of the taxable profits of the company

The learned Judge held that there was no basis for disagreeing with the conclusion arrived at by the Commissioners When the matter went up before the Court of Appeal the Court of Appeal treated it as a pure question of fact and held that on the evidence of Alfred Lee having been rejected it having been believed that Mr Lee was not in a position to advance the money no conclusion other than that arrived at by the Commissioners was possible

We may note that in the statement of the case it was overlooked that this was a decision by the Income tax Officer under section 28(4) of the Indian Income Tax Act It does not appear from the appellate order of the Tribunal that it was called upon to decide that the material on the basis of which the Appellate Assistant Commissioner had decided the appeal before him, was or was not sufficient for the conclusion arrived at by

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him The only argument that seems to have been advanced before the Tribunal, was whether the explanation given by the assessee should or should not have been accepted After having rejected that explanation the Tribunal held that the onus lay on the appellant that is the assessee of proving the source of the cash credits and connecting them with the withdrawal but the assessee had not discharged that onus

Arguments have been advanced at some length on the question of onus We may however point out that the question whether the onus lay on the assessee of proving the source of the cash credits or whether it was for the Income tax Officer to establish on the materials before him, that this was taxable income has not been referred to us for decision The Tribunal has referred to us a question which so far as we can see does not arise at all from the appellate order in a case where the assessment was made under section 23 (4) The question is

> Q —Whether there was any material before the Tribunal to justify the finding that the cash credits in question represented the assessee s income liable to assessment?

The proper question, to our minds which can arise in an assessment under section 23 (4) is

> Q —Whether in the circumstances of the case the Income tax Officer had made a fair estimate of the assessable income and whether his decision was reasonable?

Sri *Pathak* on behalf of he assessee has urged that there is no material difference between an assessment under section 23 (3) and an assessment under section 23 (4) of the Indian Income Tax Act and that in both cases the Income tax Officer must have sufficient material on which he can base his finding The point is

however, covered by high authority and we need only cite the following cases in which the difference has been clearly pointed out

In *Abdul Baree Chowdhury* v. *The Commissioner of Income tax, Burma* (1), a Full Bench of the Rangoon High Court presided over by the learned Chief Justice Sir ARTHUR PAGE pointed out

> *Ex hypothesi* an assessment under section 23 (4) must be made upon inadequate materials It is a mere estimate and if it is made by the Income tax Officer *bona fide* and to the best of his judgment (which only means as best as he can in the circumstances) the assessee who has not chosen to state an account so that the amount of profits may be strictly determined cannot complain if a random assessment is made upon him by the Crown

The learned Chief Justice relied on the judgment of the Lord President in *Macpherson and Company* v. *Moore (Surveyor of Taxes)* (2) and held as follows

> When it is said that a tribunal is invested with a judicial discretion what is meant is that in certain proved or admitted circumstances it has been given the power to act or not to act in a particular way Such a discretion no doubt must be exercised within the limit to which an honest man competent to the discharge of his office ought to confine himself ?

In the case of *Commissioner of Income tax, Central and United Provinces* v. *Laxminarain Badridas* (3) their Lordships of the Judicial Committee approved of the above decision Dealing with the matter of assessment under section 23 (4) of the Act their Lordships pointed out that in the case before them as the assessee did not produce his account books

(1) 5 I T R 352 (2) 6 Tax Cases 107 114
(3) 5 I T R 370

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the Income tax Officer took into consideration the local repute that the respondent's money lending business was extensive and included the purchasing of debts at large profit to himself and that as a result of local enquiries the Income tax Officer had found that the assessee had fluid resources amounting to ten lakhs of rupees and was reputed to be the richest man in the district In answering the question no (v) which was as follows

> (v) Is there evidence to substantiate the Income tax Officer's reasoning in the last paragraph of the order saying that legal enquiries prove that the assessee made in the account year taxable income of a lakh of rupees?

their Lordships said—

> As to (v) no evidence was necessary The officer had merely to estimate as best he might the income for purposes of assessment If any reasons were given as in the present case it was merely to show that the estimate was not arbitrary

At page 180 of the judgment their Lordships made the well known observations which are now deemed to be decisive of this point and which run as follows

> The officer is to make an assessment to the best of his judgment against a person who is in default as regards supplying information He must not act dishonestly or vindictively or capriciously because he must exercise judgment in the matter He must make what he honestly believes to be a fair estimate of the proper figure of assessment and for this purpose he must their Lordships think be able to take into consideration local knowledge and repute in regard to the assessee's circumstances and his own knowledge of previous returns by and assessments of the

> assessee, and all other matters which he thinks will assist him in arriving at a fair and proper estimate, and though there must necessarily be guesswork, in the matter it must be honest guesswork In that sense, too the assessment must be to some extent arbitrary

Reference has also been made to a Full Bench decision of the Madras High Court in *Gunda Subbayya v Commissioner of Income tax, Madras* (1), and on the strength of that decision it is urged that there is no real difference between an assessment under section 23 (3) and that made under section 23 (4) of the Indian Income Tax Act and both have to be justified on the ground of materials available on the record The point did not really arise in that case The only point that was raised was whether when an Income tax Officer sits down to make an assessment under section 23 (3) and finds that the evidence produced before him is not satisfactory he can make a best judgment assessment under section 23 (4) In the course of the judgment however the learned Chief Justice pointed out

> The assessment must be to the best of his judgment and the word judgment itself implied consideration of something Here it must be the consideration of facts relating to the income of the assessee

The learned Chief Justice held that even in a best judgment under section 23 (4) there must be some material for according to him between an assessment under sub section (3) Income tax Officer and the opinion arrived at by the and an assessment under sub section (4) of section 23 was that under section 23 (4) a more summary method was contemplated by the Act, as the assess-

(1) 1939 I T R 21

1955

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had been guilty of deliberate default We do not think there is any real difference between the decision of their Lordships of the Judicial Committee and the observations made by the learned CHIEF JUSTICE of Madras As a matter of fact the observations of their Lordships of the Judicial Committee were binding on the Madras Court and the Madras Court could not have gone against the decision of the Judicial Committee The Judicial Committee did not lay down that there need be no material They pointed out that the Income tax Officer has to come to an honest conclusion and the honest conclusion must be on some basis There is a difference between the recording of a finding on a point on the evidence produced by the parties and a case where in the absence of such evidence the Income tax Officer is left to make such enquiries as are open to him and to make an honest and reasonable assessment At the time when their Lordships of the Judicial Committee decided the case of *Commissioner of Income tax, Central and United Provinces* v *Laxminarain Badridas* (1) an order under section 23 (4) was not appealable and it was therefore not necessary for the Income tax Officer to give any reasons for his conclusions Now that the section has been amended and the order has been made appealable probably it would be necessary for the Income tax Officer to indicate how he had made the assessment worked and on what grounds but in such appeal the burden must be on the assessee to show that the Income tax Officer had either acted *mala fide* or that his order was not reasonable and was capricious

Interference by the appellate or other higher courts with the exercise of the best judgment by an Income tax Officer must in our opinion be on the same prin

(1) 5 I T R 170

ciples on which appellate courts usually interfere with the exercise of discretion by a trial court Their Lordships of the Judicial Committee in *Rehmatunnissa Begum* v *Price* (1), *held*

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The Appellate Bench decided adversely to the and it was urged in argument against interference with this decision that it is opposed to sound practice for an Appellate Court to substitute its discretion for that of the court from which an appeal has been preferred The justice of this argument is undoubted It cannot be said that the court acted capriciously or in disregard of any legal principle in this exercise of its discretion

In *Ormerod* v *The Todmorden Joint stock Mill Company (Limited)* (2) BRETT L J said

This Court lays down for itself the rule which I think is the right one that it will not exercise its own discretion unless it thinks the case is perfectly clear

HOLKER, L J in the same case remarked

Assuming as I do now that there may be an appeal when ought an appeal to be allowed?

It ought to be allowed in a very strong case that is where otherwise according to JAMES, L J, injustice would be done

The exercise of the best judgment depends on application of judicial discretion and there should be no interference by the Income tax Officer unless it is shown to the satisfaction of the appellate court that the discretion has been exercised *mala fide* or arbitrarily or capriciously The burden of satisfying the appellate court in this respect must rest on the party challenging the exercise of the best judgment by

(1) (1917) L R 45 I A 60 (2) L R (1881) 8 Q B 690

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the Income tax Officer There was no suggestion in the case before us that the order of the Income tax Officer was either *mala fide*, capricious, arbitrary or unreasonable If the question referred to us had been whether the Income tax Officer could have reasonably come to the conclusion in a best judgment assessment under section 23 (4) that the income of the assessee was as computed by him we would have had no hesitation in answering the question in the affirmative

Sri *Jagdish Swarup*, learned counsel for the Department, at one time pressed that we should ask for a fresh statement of the case under section 66 (4) of the Indian Income Tax Act so that we may have before us facts or circumstances on which the Income tax Officer and the Appellate Assistant Commissioner of Income tax had acted but in that case we would have to ask for a reference on a question not raised by the assessee before the Appellate Tribunal Having read the order of the Income tax Officer and the Appellate Assistant Commissioner we do not feel disposed to ask for any further reference Question no 3 as framed to our minds does not arise out of the appellate order and we need not therefore give any answer to it

Our answers to the first two questions are, therefore, in the negative and as we have held the third question does not ar[illegible] appellate order

The [illegible]see must pay costs to the Department which we assess at Rs 400

Questions answered

CIVIL MISCELLANEOUS

Before the Honourable B Malik, Chief Justice and Mr Justice Bhargava

MITHOO LAL TEK CHAND (APPLICANT)

1953
February 5

THE COMMISSIONER OF INCOME TAX
(OPPOSITE PARTY)

EXCESS PROFITS TAX ACT, 1940 s 10A—*Certain sum of money received by assessee as appeared from his books of account—Burden on assessee to explain entries—Receipt whether a revenue receipt—Question of fact to be decided on materials available*

If from the books of account of an assessee it appears that during the relevant account period he had received certain sum of money the burden is on him to explain from where he got the same

Where an assessee claims that a receipt—its true source being known—is not taxable income the burden is on the assessee to show the true nature of the receipt and where he claims that it is not taxable income If his explanation is rejected the Tribunal has to record a finding on such materials as may be available whether the money received is a revenue receipt taxable as income of the relevant account period

A question whether a receipt is a revenue receipt taxable as income received in a particular year is always a question of fact which has to be decided on the materials available In each case the revenue authorities are entitled to take into consideration the fact that the explanation given by an assessee is either unreasonable or is false and then to consider whether that circumstance alone or the other materials available along with that circumstance would entitle them to hold that the amount so deposited represented the undisclosed income of the assessee in the year in question The mere fact that an explanation of the assessee is unsatisfactory does not necessarily lead to a conclusion that the receipt is a revenue receipt taxable as income

Case law discussed

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MUTHOO LAL TERCHAND
v.
THE COMMISSIONER OF INCOME TAX

Civil Miscellaneous no 5 of 1950

The facts appear in the judgment

G S *Pathak* for the applicant

The Junior Standing Counsel (*Jagdish Swarup*) for the opposite party

The judgment of the Court was delivered by—

MALIK, C J —This reference arises out of three cases two of them relate to income tax assessment for the years 1943-44 and 1946 47 and the third to excess profits tax assessment for the year 1946 47 The assessee is a Hindu undivided family which carries on business in grain cloth commission agency speculation etc The method of accounting as given in the assessment orders is mercantile The relevant account period for the assessment year 1943 44 was from 20th of October 1941 to 8th November 1942 The Income tax Officer found a cash deposit of Rs 5 000 in the capital account of the assessee in the name of Surajmal Suraj Ram entered on the 25th of October 1941 When he asked the assessee from where the amount had come the assessee stated that it was a part of the amount unspent out of the withdrawal of Rs 30 000 on the 18th [illegible] 1940 For the assessment year 1946-47 the relevant account year was from the 17th of October 1944 to the 4th of November, 1945 On the first day, i e the 17th of October, 1944 there were three credit entries in the capital account a sum of Rs 50 000 in the name of Surajmal Suraj Ram as having been received from him another sum of Rs 10 000 as having been received from Srikisan Das and a third sum of Rs 5 000 as having been received from Dharam Dass Surajmal Suraj Ram Srikishan Das and Dharam Dass are all members of the Hindu undivided family

The explanation given by the assessee was that Suraj mal Suraj Ram had withdrawn a sum of Rs 50 000 on the 10th of September 1936 and two sums of Rs 10 000 and Rs 5 000 were respectively withdrawn by Srikishan Das and Dharam Das on the 18th of July, 1940 and that it is these three items that had been brought back and redeposited on the 17th October, 1941 The explanation given by the assessee as regards these three items was rejected The Tribunal pointed out that the assessee could not have kept such large sums of money lying idle for such long periods and the assessee must have utilized the amounts withdrawn to make other profits that the assessee carried on business on a large scale and it was not expected that the assessee would instead of investing these large sums let them remain idle that it was not believable that all these sums would be kept at the family house at Jaselmair where only women and servants resided and that the assessee had bank accounts and it was not likely that if the money was withdrawn and not utilized the money would not be put back in the business or deposited in the bank and would be allowed to remain unproductive in the hands of the various members of the family The Tribunal also have noticed that if the sum of Rs 50 000 withdrawn by Surajmal Suraj Ram on the 10th of September 1936 (and not 1933 as mentioned by the Appellate Assistant Commissioner) had remained undisposed of in the hands of the assessee was no reason why on the 18th of July 1940 he should have withdrawn from business another sum of Rs 30 000 and deposited Rs 5 000 out of the latter sum on the 25th of November 1941 and the sum of Rs 50 000 not till the 17th of October 1944 We have no hesitation therefore in agreeing with the Tribunal that there was sufficient material on which the Tribunal could hold that the explanation given by the assessee was false

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The next question that arises is whether it was a reasonable inference that these sums represented secret profits made during the relevant account year. We find from the assessment order of the year 1943-44 that in that year the business income of the assessee was computed at a figure of Rs. 47,666. The assessee as has already been said carried on extensive business in grain, cloth, commission agency and speculation. The explanation given by the assessee having been rejected and it having been found that he had given false explanation as to the receipt of these items, it could not be said that the inference drawn by the revenue authorities that this represented secret profits of the year in which the amounts were entered was unreasonable.

It has been urged by Sri *Pathak* that the burden of proving that any receipt is assessable income rests on the Income-tax Officer and the mere fact that the explanation given by assessee is false does not warrant the inference that the receipt is taxable income. Sri *Jagdish Swarup* on behalf of the Department has urged that if it appears from the account book of the assessee or otherwise that in the relevant account period, the assessee has received a sum of money, the burden lies on the assessee to show that that is not taxable income and if the explanation given by the is unsatisfactory, the Income-tax Officer can assume that the amount must be taxable income. A large number of cases have been cited at the Bar which Sri *Jagdish Swarup* has divided into three groups. The first group relates to cases under section 10A of the Excess Profits Tax Act, the second group relates to cases under section 34 of the Indian Income Tax Act and the last group relates to the question of assessment under section 23(3) of the Indian Income Tax Act. According to Sri *Pathak*, there is no justification in this grouping and he has contended that the same principle should

govern all these cases We are, however, inclined to agree with Sri *Jagdish Swarup* that the cases have to be grouped in the manner suggested by him

The relevant portion of section 10A of the Excess Profits Tax Act reads as follows

> 10A(1)—Where the Excess Profits Tax Officer is of opinion that the main purpose for which any transaction or transactions was or were effected was the avoidance or reduction of liability to excess profits tax he may make such adjustments as respects liability to excess profits tax as he considers appropriate

If as a result of a transaction entered into by an assessee the liability to excess profits tax is affected and the Excess Profits Tax Officer claims that that transaction was entered into with the definite purpose of evading liability to excess profits tax the burden must be on him to prove that the main purpose behind the transaction was avoidance of the payment of the tax To this effect are decisions in *Ganga Sahai Umrao Singh* v *Commissioner of Excess Profits Tax, U P, C P and Berar* (1) a decision by this Bench in *C S Hajee Mohammad Ibrahim and Company* v *Commissioner of Excess Profits Tax, Madras* (2) a decision of the Madras High Court and in *Amritsar Rayon and Silk Mills, Ltd* v *Commissioner of Income tax, East Punjab* (3) a decision of the East Punjab High Court

In the second group of cases falling under section 34 of the Indian Income Tax Act it must be borne in mind that the assessment was once completed and the Income tax Officer wants to reopen the same the burden must, therefore lie on him to show that there was sufficient justification for reopening the proceedings which had

(1) 1950 I T R 988 (2) (1952) 22 I T R 324
(3) (1952) 21 I T R 548

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once been concluded The cases cited before us related to a period before 1948 when section 34 of the Indian Income Tax Act was not amended and it is not necessary for us in this case to consider the effect of the amendment nor is it necessary to discuss those cases at any length Those cases are *Lalpmal Girdhar Das* v *Commissioner of Income tax, U P* (1) again a decision by this Bench *Messrs Radhey Lal Jawahar Lal* v *The Commissioner of Income tax, U P* (2) *Lal Mohan Krishan Lal Paul* v *Commissioner of Income tax, Bengal* (3) and a Full Bench case of this Court *in re Ram Datta Sita Ram of Basti* (4) In those cases the burden of proving that it was taxable income of the relevant years was placed on the Income tax Officer On the other hand in *Mahabir Prasad Munna Lal* v *Commissioner of Income tax* (5) where the assessee s explanation was rejected it was held hat in each case it would be a question of fact and the answer would depend on the finding whether the inference was a reasonable inference from the assessee s failure to prove his case

The cases in the third group are cases where an Income tax Officer in the course of an assessment under section 23(3) discovers that the assessee has received a sum of money during the relevant account period and his explanation as to the nature of the receipt is not satisfactory These cases are really in point and we would therefore deal with the cases in this group at some length

The first case that was cited to us is *Ganga Prasad* v *Commissioner of Income tax, U P* (6) In that case there was an entry of the receipt of a sum of money

(1) (1951) 19 I T R 518
(2) Miscellaneous Case no 8 of 1949 decided on 19th January 1952
(3) (1944) 12 I T R 441
(4) (1947) 15 I T R 61
(5) (1947) 15 I T R 303
(6) (1941) 9 I L R 873

The assessee claimed that the money had been gifted by his aunt. This explanation was not satisfactory. The Income tax Officer further found that he gave an evasive reply to a direct question whether the money did not represent profits made by himself. It was also found that there was a regular inflow of money year after year from the same source. A conclusion was drawn that the assessee had been carrying on a secret business which yielded income and profit. This Court held that this was a conclusion on a question of fact and no question of law arose.

The facts in *Stoneleigh Products Limited* v. *Dodd (H. M. Inspector of Taxes)* (1) are somewhat similar. The assessee claimed that a greater part of the amount represented money belonging to his aunt which she had lent. The aunt was examined and she denied having ever lent the money. The amount was then treated as taxable income. It was held that the question was one of fact.

In *J. A. Shellim* v. *Commissioner of Income tax, Bengal* (2), the assessee's bank accounts showed considerable credits for a period of one year. The assessee gave no information as to the source of these credits. The Income tax Officer was obliged to act under the provisions of section 18 and in doing so he allowed two-third of the total amount of credits towards expenses and included the balance of one third in the assessable income. It was held that this was a pure question of fact there being nothing to show that the Income tax Officer had in any way acted inconsistently with the provisions of section 18.

In *Jodunandan Sahu Deokisan Ram* v. *Commissioner of Income tax, Bihar and Orissa* (3) the assessee's explanation that the amounts entered were received from

(1) 30 Tax Cases 1. (2) (1946) 14 I.T.R. 818.
(3) (1946) 16 I.T.R. 175.

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the home chest of the family was disbelieved. The return showed extraordinarily low profits and from the circumstances the Tribunal had held that these were secret profits. On a reference the High Court held that it could not go into the question whether the conclusion arrived at by the Tribunal was justified so long as there was legal evidence to support it.

In *G. M. Madappa v. Commissioner of Income tax, Madras* (1) it was held that the burden of proving that cash credits were not profits was on the assessee and not on the Income tax Officer and the fact that he had failed to notice similar unexplained cash receipts in earlier years did not affect the question of burden of proof. The observations are important and are as follows:

> There cannot be slightest conceivable doubt that when both the source and the nature of the cash receipts shown in the accounting year have not been proved, the Income tax Officer cannot draw any other inference except that those two amounts are income receipts. He cannot come to the conclusion that they are capital receipts. If it were held that he should, the result would be that every assessee will be entitled to enter cash credits in his account and refuse to furnish the requisite particulars about its source and nature and insist that those entries should be automatically treated as capital receipts and not as income receipts.

In re Udayram Jagannath (2), the assessee's explanation that certain cash credits entered in his books represented loans was rejected. The question referred was to the effect whether the Tribunal was justified in holding that the amount represented revenue receipts

(1) (1948) 16 I.T.R. 385 (2) (1951) 19 I.T.R. 222

disguised as cash deposits The High Court held that the question was one of fact for the Tribunal to decide and on the facts of the case it could not be said that there were no materials on the record on which the Tribunal could come to the finding it had arrived at

The facts in *Commissioner of Income tax and Excess Profits Tax, Madras v South Indian Pictures, Ltd Karaikudi* (1) were entirely different There the source of the receipt was known The amount having been paid to the assessee as compensation for elimination of three contracts the question was whether this was income or a casual receipt or capital receipt It was held that if the Department claims to exercise the right of taxing a particular receipt it must be established that the receipt in question was income profit or gain falling under any of the heads of income mentioned in section 6 of the Act

The last case cited at the Bar is *Narayandas Kedarnath v Commissioner of Income tax Central* (2) The facts in this case were also different There too the source of the money received by the assessee was established It represented genuine remittances from outside by partners The explanation of the partners as to where they got the money from was not accepted It was held that from the failure to accept the explanation of the partners the Department might be able to draw an inference that the amount represented undisclosed profit of the partners but there was no material on which it could be held that the remittances were undisclosed profits of the assessee firm

An examination of these cases would therefore go to show that if from the books of account of the assessee it appears that during the relevant account period he

(1) (1951) 20 I T R 605 (2) (1952) 22 I T R 18

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Mahk C J

had received certain sums of money, it is for him to explain from where he got the same and if his explanation is accepted there is an end of the matter The question then migh arise, which would be in most cases a question of law whether the assessee s claim that the receipt—its true source being known—is no taxable income is justified or not Where however his explanation is rejected the Tribunal has to record a finding on such materials as may be available whe her the money represents revenue receipt taxable as income of the relevant account period The burden in the first in tance, mus be on the assessee to show the true nature of the receipt and why he claims that it is not taxable income When the assessee furnishes an explanation if that explanation is unsatisfactory that may in itself be a circumstance which the Income tax Officer may be entitled to take into consideration but it need not necessarily in every case lead to the conclusion that the receipt is a revenue receipt taxable as income received in a particular year The question must always remain a question of fact which has to be decided on the material available In each case the revenue authorities are entitled to take into consideration the fact that the explanation given by the assessee is either unreasonable or is false and then to consider whether that circumstance alone or the other materials available along with that circumstance would entitle them to hold that the amount so deposited represented the undisclosed income of the assessee in the year in question

Mr *Pathak*, learned counsel for the assessee has relied on the fact that the amoun of Rs 5 000 was deposited on the 25th of November 1941 i e, a month and five days from the beginning of the account year, which was 20th October 1941 Considering the extent of the business mentioned above, it cannot be said that

it was not possible for the assessee to have made secret profits of Rs 5 000 in the course of a month and five days We cannot therefore say that the inference drawn was an unreasonable inference

As regards however the cash deposit of Rs 65 000 learned counsel for the assessee has pointed out that the deposit was made on the very first day of the account year and considering the extent of the business carried on by the assessee, it was not possible that they could have made a profit of Rs 65 000 on one day The Tribunal however, did not seem to have attached any importance to this argument and have overlooked this aspect We have looked through the assessment order for the year 1946-47 and we find that in that year the assessee had made a total profit of Rs 1 08 166 After deducting a sum of Rs 45 378 for excess profits tax liability the business profits tax were reduced to Rs 62 788 The sum of Rs 65 000 thus was more than half of the total profits made in the course of the year and it is not at all reasonable to expect that this huge profit could have been made on the 17th of October 1944 the first day of the relevant account year No attempt was made to go further into this matter or to procure any material which would go to show that this huge profit could be made on the first day when the account year commenced Mr *Pathak* has offered to produce before us the account books to show that after having carried over the previous year s balance these were the first entries that were made in the account books He has suggested that the entries must have been made early in the day and there was, therefore no likelihood of any secret profit having been made on that day We do not think we can allow learned counsel to produce fresh evidence before us but from the circumstances that appear from the statement of the

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case and the assessment order we do not think we can say that there was any material from which a conclusion could be arrived at that Rs 65,000 was the profit made in the account year from 17th October 1944 to 4th November 1945 We may mention that we are not called upon to decide nor is it the case of the Department that these profits were made in the previous account year 1943 44

Our answer therefore to the question referred to us is that the Tribunal could reasonably hold that the cash deposit of Rs 5 000 in the assessment year 1943 44 represented the assessee s assessable income from some undisclosed source but it was not a reasonable inference that the sum of Rs 65 000 was income taxable in the assessment year 1946 47

As the assessee has substantially won we allow them costs which we assess at Rs 300

Questions answered

APPELLATE CIVIL

1953 February 19

Before the Honourable B Malik, Chief Justice and Mr Justice Agarwala

MADHUA NAND AND OTHERS (DEFENDANTS)

v

PT SURESHANAND AND OTHERS (PLAINTIFFS)

United Provinces Land Revenue Act, 1901 *s* 207— *Person interpretation of—Arbitration—Award—Decree—Suit to set aside a decree by persons not parties maintainable—Jurisdiction—Civil Court—Specific Relief Act* 1872 *s* 42—*scope of—Code of Civil Procedure* 1908 *s* 11 *Exp* 6 *scope of*

The word person in s 207 of the United Provinces Land Revenue Act 1901 has reference to the person before the revenue court and parties to the case before that court and has no reference to persons who were not parties to the case

A suit to set aside a decree of a revenue court passed on the basis of an award of arbitrators appointed under an agreement of reference filed by persons who were no parties to that agreement is not barred by s 207 of the United Provinces Land Revenue Act 1901

Such a suit falls clearly within the purview of s 42 of the Specific Relief Act 1872 and is of a civil nature

Explanation 6 to s 11 of the Civil Procedure Code 1908 has no application where the previous suit was not a representative one by virtue of proceedings having been taken under Or I r 8 of the Code and the persons sought to be bound by the decision arrived at in that case cannot be deemed to have been represented in that litigation

Second Appeal no 620 of 1942 from a decree of F N Crofts, District Judge Kumaun dated the 23rd December 1941

The facts appear in the judgment

S P *Sinha*, for the appellants

R C *Ghatak*, for the respondents

The judgment of the Court was delivered by—

AGARWALA, J —This is a defendants appeal arising out of a suit for a declaration that a certain decree of the revenue court dated 27th February 1938 obtained by the appellants was void and not binding on the plaintiffs respondents and the defendants second set who are arrayed as respondents The facts briefly stated are as follows

The defendants first set are residents of village Gheri and the defendants second set are residents of an adjoining village. Both these villages are situated in the district of In the revenue settlement which was made sometime in 1936 Gheri people claimed a right to graze their cattle in a plot of land which was included within the boundaries of the village Thapli and prayed that the plot be included within the boundaries of their village Gheri The Settlement Officer considered the claim and held

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that the plot of land over which grazing rights were claimed should be attached to village Gheri and made the entries accordingly. In appeal the Commissioner overruled the decision of the Record Officer. The Gheri people then filed a suit in the revenue court for a declaration of their rights. In this suit they failed to implead some of the residents of village Thapli. Some of the persons who were impleaded as defendants in that suit died and their heirs were not brought on the record. The suit was referred to arbitration at the instance of some of the parties to the suit but not all. The plaintiffs of the present suit were no parties to the agreement of reference to arbitration. The arbitration award was partly in favour of the plaintiffs of that suit. The revenue court passed a decree in terms of the award. Further appeals and a revision were unsuccessful. Then the suit giving rise to the present appeal was filed in the civil court for a declaration that the decree obtained by the appellants from the revenue court was not binding on the plaintiffs or the defendants second set on the ground *inter alia*, that the plaintiffs not being parties to the reference to arbitration were not bound by the result of the previous suit.

The defence to the suit was that the suit was not cognizable by the civil court and further that in ground the the decree of the revenue court to set plaintiffs and the dismissed the suit holding that the case was not cognizable by the civil court. In appeal the lower appellate court reversed the decree of the trial and decreed the plaintiffs' suit.

In this second appeal by the defendants first set it was urged that the suit was not of a civil nature and was not cognizable by the civil court. This contention has

no force The suit was for a declaration that a certain revenue decree was not binding on the plaintiffs and that the defendants decree holders were not entitled to exercise the rights in respect of the property owned by the plaintiffs and the defendants second set This suit was clearly one which fell within the purview of section 42 of the Specific Relief Act and was of a civil nature The contention of the learned counsel for the appellants was that section 207 of the Land Revenue Act barred the suit in the civil court Under section 203 of the Act any dispute pending before the officers mentioned in that section may with the consent of the parties be referred to arbitration and the officer concerned may pass a decree in terms of the award given by the arbitrator Section 207 then provides

> Such decision shall be at once carried out and shall not be open to appeal unless the decision is in excess of or not in accordance with the award, or unless the decision is impugned on the ground that there is no valid award in law or in fact
>
> and *no person* shall institute any suit in the civil court for the purposes of setting it aside or against the arbitrators on account of their award

Reliance is placed upon the expression no person and it is urged that it includes every person whether he was a party to the case before that court It can have no reference to persons who were not parties to the case before that court The plaintiffs in the present case were not parties to the agreement of reference in the case in which the decree in dispute was obtained Section 207 in our opinion did not

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debar them from claiming the right which they do in the present suit

It was next urged that though the plaintiffs were not themselves parties to the reference in the revenue court they were still bound by virtue of the provisions of Explanation 6 to section 11 of the Civil Procedure Code This contention also is in our opinion untenable Explanation 6 to section 11 refers to a case in which the person sought to be bound by the decision is deemed to be represented in the previous suit by virtue of proceedings having been taken under Order I Rule 8 of the Civil Procedure Code or otherwise *vide Kumaravelu Chettiar v T P Ramaswami Ayya* (1) and *Nathari Shastri v Basudeo Nambori* (2) Where the previous suit was not representative and the persons sought to be bound by the decision arrived at in that case cannot be deemed to have been represented in that litigation Explanation VI to section 11 can have no application

No other point was raised There is no force in this appeal, and we dismiss it with costs

There is a cross objection with regard to the costs not allowed to the respondents by the lower appellate court The lower appellate court has had full discretion in the matter of awarding costs and we see no ground of law is involved We do not disturb the cross objection which is dismissed

Appeal and cross objection dismissed

(1) A I R 1938 P C 188 (2) 1936 A L J 690

APPELLATE CIVIL

Before the Honourable B Malik, Chief Justice and Mr Justice Bhargava

SHARMA AND COMPANY (DEFENDANT)

v.

KEDAR NATH (PLAINTIFF)

1953
August, 3

Code of Civil Procedure, 1908 Or XI r 21 s 151—*Order of a court being deliberately flouted by a party to litigation—Court if has jurisdiction to strike off defence*

In a proper case where a court is satisfied that a party to a litigation has been contumacious and has deliberately flouted the order of the court and has been abusing its process it has jurisdiction to dismiss the suit or to strike off the defence under Or XI r 21 or s 151 of Code of Civil Procedure

Second Appeal no 370 of 1949 from a decree of Datta Ram Misra Temporary Civil and Sessions Judge of Kanpur dated the 26th January 1949

The facts appear in the judgment

S B L Gaur, for the appellant

Krishna Shanker, for the respondent

The judgment of the Court was delivered by—

MALIK, C J —This second appeal has been referred to a Bench by a learned single Judge as he thought that certain decisions of this Court which were cited before him could not be reconciled with each other

The plaintiff filed a suit for rendition of accounts and recovery of Rs 1 700 or any amount which may be found due to him after accounting The plaintiff's case was that he was employed as defendant's servant and the terms of employment were that he was to get

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Mahajan C. J.

Rs 80 per mensem as salary and another sum of Rs 80 per mensem as bonus and while the salary was to be paid monthly the bonus was to be paid yearly or at the time of termination of service, the contract of service being terminable by one month's notice on either side The plaintiff claimed that three months salary was due to him i e Rs 240, and he was also entitled to bonus for 16 months i e Rs 1 280 and he was entitled to one month's further pay in lieu of notice and a sum of Rs 100 out of a deposit of Rs 500 which he had made at the time of his employment and which amount had not been refunded to him the total thus claimed being Rs 1 700 The suit was filed on the 31st of May 1948 and on the same date the plaintiff applied that a commissioner be appointed to seize the account books of the defendant's firm and certain other files of that firm Without issuing any notice to the defendant, the learned Munsif on the 1st of June, 1948 appointed a commissioner The commissioner went to the spot on the same day and took possession of seven account books and five files on the first page and the last page of which he put his signature and then placed them in a desk which he locked and sealed The desk was then put in charge of the defendant On the 2nd of June the commissioner made a report of what he had done and further mentioned that he had not been able to take charge of all the books and the files required by the plaintiff On the 3rd of June, 1948 the defendant filed an application protesting against the taking charge by the commissioner of his account books and files which he said he was required to produce before the Income tax Officer on a particular date and further offering to file copies of such entries which the plaintiff might consider relevant On behalf of the plaintiff however it was stated that he had no objection to the books and files being returned to the

defendant provided the commissioner was allowed to make a complete inventory of the books and files required by the plaintiff and put his signatures on them On the same day the learned Munsif passed an order that the seven account books and five files which had been locked and sealed in a desk may be returned to the defendant but that the commissioner should make a complete inventory and put his signature on the other account books and files required After the order the defendant was handed back the seven account books and the five files and he undertook to produce them wherever required by the plaintiff On the 17th of July 1948 the commissioner made a fresh report that during the period between the 3rd of June and the 17th of July he had made several attempts to make a complete inventory but the defendant had on some pretext or other prevented his carrying out the orders of the court On the 23rd of July 1948 the plaintiff filed an application that the commissioner should be directed to take the account books in his possession and on the 30th of July 1948 the court granted the application After the order of the 30th of July the defendant filed an application on the same day objecting to the commissioner taking possession of his books and putting his signature on them but the court refused to revise its previous order On the 5th of August 1948, the defendant filed another application that the court s order on the plaintiff s application of the 23rd of July was passed without notice to him and that before any further orders are passed the court should decide whether the plaintiff was entitled to get the account books produced On the 13th of September 1948 the learned Munsif set aside his first order of the 30th of July 1948 on payment of Rs 10 On the 12th of August 1948 the plaintiff filed his reply to the defendant s application of the 30th July 1948 and on

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the 13th of September 1948, the learned Munsif again passed an order that the commissioner should sign the defendant's books On the 17th of September 1948, the commissioner signed three more account books and on the 20th of September 1948 he made a report that he had put his signature on the first and the last pages of three more account books but that there were other files and books which were not produced before him On the 1st of October 1948 the plaintiff filed an application that the defence be struck off and on the same day the learned Munsif passed an order directing that the defence be struck off under Order XI Rule 21 of the Civil Procedure Code and on the 8th of October 1948 he decreed the suit *ex parte* Against the *ex parte* decree of the 8th of October the defendant filed an appeal but the lower appellate court affirmed the order of the learned Munsif and dismissed the appeal There was a second appeal filed in this Court which was cognizable by a learned single Judge and on the learned single Judge having referred the case it has come up before this Bench for decision

On going through the record carefully we were surprised to find that most of the orders passed by the learned Munsif were without issuing any notice to the other side Whenever an application was filed by a party he passed an order on it and left it to the other party to come and object We were also surprised to find that up to now no court has tried to look into the question whether the plaintiff was justified in getting the commissioner appointed to sign the account books and files of the defendant or an order that the commissioner should take charge of account books and files belonging to the defendant

These facts were admitted that the plaintiff was defendant's servant and that he was entitled to Rs 80

per mensem as salary As regards the bonus the defendant's case was that it was an *ex gratia* payment while the plaintiff alleged that it was a part of the contract of his service that he would be paid bonus at the fixed rate of Rs 80 per mensem The other point in dispute was whether the plaintiff worked up to the 13th of January 1947 when he ceased to work for the defendant as was pleaded by the defendant or his services were terminated on the 18th of April 1947, as was alleged by the plaintiff The plaintiff being admittedly defendant's servant we do not see how the plaintiff could claim rendition of account. We looked into the application dated the 31st of May 1948 and the books of account summoned They were Khata Bahi, Pakki Rokar Bahi Pakki and Naqal Bahi for Samvat 2002 2003 and 2003 2004 as also Mal Naqal Kapra Bahi Bahi Mal Naqal Sut Rokar Chaupati Datkhati Bahi and a number of miscellaneous files How these papers were relevant was not disclosed in the application and the learned Munsif at no stage sat down to find out the relevancy of these papers On the 1st of June the commissioner took charge of the Khata Bahi Pakki the Rokar Bahi Pakki and the Naqal Bahi of Samvat 2002 2003 He also took charge of the Mal Naqal Sut Nam Bill Bahi Kapra Nam Bill Bahi Sut Mal Naqal Kapra and five files relating to the defendant's firm On the 17th of September 1948 the commissioner took charge of and signed the Khata Bahi Pakki the Rokar Bahi Pakki and the Naqal Bahi for Samvat 2003 2004 The main account books therefore had already been taken charge of by the commissioner Some miscellaneous books for Samvat 2003 2004 and probably some other files were all that remained If the plaintiff's object was to show that he had written these account books up to the 18th of April as was alleged before us by his learned counsel and if

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that were true the main account books having been signed by the commissioner and taken charge of by him there could be no further difficulty to prove his allegation

We are therefore constrained to observe that in passing the various miscellaneous orders the learned Munsif erred in not issuing notice to the other side before passing the orders He also erred in directing the commissioner to seize the books or to sign them without first going into the question whether the plaintiff has a right to have those books produced or seized and whether those books were relevant for the decision of the case The learned Munsif has not even gone into the question whether the defendant was an accounting party in spite of the fact that the defendant had applied to him for a decision on that point

In a suit by a partner for dissolution of partnership and accounts or by a person interested in the assets of a firm for his share in the assets after accounting or in a suit for accounts by a master against a servant or by a principal against his agent and in other similar cases the plaintiff may have the right to apply to the court that the account books be seized or the defendant be directed to produce them so that the books may not be destroyed damaged or tampered with but in a case like the present where the plaintiff who was admittedly the servant of the defendant had brought a suit for recovery of arrears of salary and for payment of arrears of bonus which according to him was to be paid at a fixed rate and for return of sum of Rs 100 which he said he had deposited but which had not been refunded by the defendant it is difficult to see how the defendant could be called an accounting party and how the plaintiff could claim from the defendant a relief that the defendant be directed to render accounts We asked learned counsel for the plaintiff the question and

the only answer that he could give was that the books and the papers were needed to show that the plaintiff was working as defendant's servant up to the 18th of April 1947, and not up to the 13th of January 1947 as was alleged by the defendant. The account books and files were therefore required merely as pieces of evidence.

There are elaborate provisions in the Civil Procedure Code as regards the manner in which the facts in issue have to be proved and in which the evidence, documentary and oral, has to be produced. Under Order X the court is required to examine the parties to bring out clearly the point in controversy between them. Rules 1 to 10 of Order XI provide for service of interrogatories by one party on the other and if these interrogatories are insufficiently answered or a party on whom they have been served omits to answer them, rule 11 provides that the party interrogating may apply to the court for an order requiring him to answer or to answer further, as the case may be, and an order may be made requiring him to answer or answer further, either by affidavit or by *viva voce*, the suit and for having costs. Rule 12 onwards then provides that the interrogatories shall be submitted to the court and the court has to apply its mind as to what interrogatories should be answered for disposing fairly of the suit and for saving costs. Rule 12 onwards then provides for discovery of documents. Rule 12 provides that a party has to apply to the court for an order directing any other party to any suit to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. The court has then to be satisfied that the discovery is necessary and at that stage of the suit such discovery shall be ordered only when the court is of opinion that it is necessary either for disposing fairly of the suit or for saving costs. The application of the

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31st of May that a commissioner may be appointed to seize the account books was not an application under Order XI rule 12 nor does it appear that the court had at any stage applied its mind to the question whether the documents to be seized were necessary for disposing fairly of the suit or for saving costs After the discovery a party has a right under rule 18 to call for inspection Again an order of inspection should not be made unless the court is satisfied that such inspection is necessary either for disposing fairly of the suit or for saving costs Rule 19 provides for supply of verified copies Rule 20 in this connexion is important as it provides that if the right to discovery or inspection depends on determination of any issue or question in dispute in the suit then that question or issue should be decided before such discovery or inspection is ordered We have then rule 21 which provides that when any party fails to comply with any order to answer interrogatories or for discovery or inspection of documents he shall if a plaintiff be liable to have his suit dismissed for want of prosecution and if a defendant, to have his defence if any struck out Rule 21 can therefore only apply to cases where the provisions of Order XI have been followed and interrogatories have been duly served in accordance with the order of the court and that order had not been obeyed or discovery or inspection had been asked for and ordered by the court and the order of the court had been disobeyed The cases on the point appear to be clear enough and they are—*Kishan Lal v Sultan Singh* (1), and *Lyallpur Sugar Mills Co Ltd v Ram Chandra Gur Sahai Cotton Mills Co Ltd* (2)

We have then separate provisions in the Code for production of documents and they are contained in

(1) (1918) I L R 38 All 5 (2) (1922) I L R 44 All 586

Order XIII which entitled a party to produce his own documents, and then Order XVI rule 6 which applies to the summoning of documents from third parties and which has been made applicable to summoning of documents from parties to a suit by rule 21 Provisions regarding failure to comply with the summons are to be found in rules 10 11 and 12 which entitle the court to issue a warrant and issue an attachment order Rule 20 provides that where a party to a suit present in court refuses without lawful excuse when required by the court to give evidence or to produce any document then and there in his possession or power the court may pronounce judgment against him or make such order in relation to the suit as it thinks fit We may mention that in the old Code of 1882 section 136 provided for striking off the defence or dismissing the suit not only for non compliance with an order to answer interrogatories or for discovery or inspection of documents but also an order for production of documents but as the rules as regards production of documents were in the new Code placed under a separate order those words were omitted from Order XI rule 21

This case was referred to us by a learned single Judge for the decision of the question whether the court has inherent jurisdiction to strike off a defence where a defendant had flouted the authority of the court and had not carried out its orders We have already said that the applications filed in this case on behalf of the plaintiff could not be said to have been applications contemplated by Order XI of the Code and the court therefore could not have acted under rule 21 of Order XI This does not however mean that in a proper case where the court is satisfied that a party to the litigation has been contumacious and has deliberately flouted the orders of the court and

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has been abusing its process it has no jurisdiction to dismiss the suit or to strike off the defence under Order XI rule 21 or even under section 151 of the Code. See *Gauri Shankar* v. *Musammat Manki Kunwar* (1) and *East Indian Railway Company* v. *Jit Mal, Kallu Mal* (2). But such orders should be rare and only in cases where a party had been guilty of deliberate disobedience and no such orders should be passed without first giving the party an opportunity to show cause so that he may if he so desires mend his ways. In the case before us unfortunately learned counsel for the plaintiff does not appear to have made any application in accordance with the provisions of Order XI and the learned Munsif does not seem to have brought to bear a judicial mind on the question whether the applications filed by the plaintiff should or should not be granted and he does not appear at any stage to have thought it necessary to issue a notice. In the circumstances we find it difficult to uphold the orders of the lower courts.

We went carefully through the record to see whether the observations of the lower appellate court that the order of the 13th of September 1948 was a consent order is correct and it does not appear from the record that it was so.

The result therefore is that we allow the appeal set aside the orders of the lower courts and send the case back to the trial court to proceed according to law. The costs here and hitherto will abide the result.

Order accordingly.

(1) (1923) I.L.R. 45 All. 624. (2) (1925) I.L.R. 47 All. 638.

CIVIL MISCELLANEOUS

Before Mr Justice Agarwala and Mr Justice Chaturvedi

SHYAM LAL (APPLICANT)

v

STATE OF UTTAR PRADESH AND ANOTHER (OPPOSITE PARTIES)

1958
October 1

Constitution of India, *Art 311—Words removal showing cause —Meaning explained—Civil Service Regulations paragraph 465 A—Word retirement used in it if included in removal —Paragraph 465 A whether valid*

The word removal in Art 311 of the Constitution is not used in its widest connotation but refers to a removal which is for some fault or misconduct of the employee himself who may try to explain it

A retirement under paragraph 465A of the Civil Service Regulations is not comprised within the word removal used in Art 311 of the Constitution

Rule 465A of the Civil Service Regulations is a valid rule not affected by rule 649 in the case of Civil Service of Engineers and not cancelled or abrogated by rule 56 of the Fundamental Rules

The expression showing cause as used in Art 311 of the Constitution does not imply a mere opportunity of submitting an explanation but implies that an adequate opportunity of leading evidence in support of the contentions of person concerned and controverting contentions raised against him must be given and if necessary opportunity of cross examining witnesses of the other side and of addressing arguments should also be given

Case law discussed

Civil Miscellaneous no 379 of 1958

The facts appear in the judgment

Jagdish Sahai for the applicant

The Advocate General (*K L Misra*) for the opposite parties

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The judgment of the Court was delivered by—

AGARWALA, J.—Shyam Lal, applicant was a member of the Indian Service of Engineers occupying the post of the Superintending Engineer VI Circle, in the Irrigation Department of the State of Uttar Pradesh. He was promoted to the rank of Superintending Engineer in August 1944 and was holding that post when the dispute in the case that calls for decision arose. The applicant passed his Civil Engineering Examination from the Thompson College Roorkee in 1922 standing first in his class. He was awarded the Council of India Prize of Rs 1,000 for being the best student of the year and a prize of Rs 250 for being the best Indian student of the year. He was also awarded the Cautley Gold Medal for the best Engineering design of the year. He was appointed in the Indian Service of Engineers in October 1928 by the Secretary of State for India in Council. At the time of his appointment the applicant was given a letter of appointment by the Secretary of State for India in Council which prescribed *inter alia* the conditions governing the applicant's terms of appointment, conditions of service, promotion, leave, pension etc. A copy of the letter has been annexed to the petition. After the attainment of Independence by India a fresh covenant was entered into between him and the Governor of Uttar Pradesh and the Governor General of India by which the applicant's original conditions of service were confirmed. According to the applicant he incurred the displeasure of certain colleagues in the service whose work he had the misfortune to criticise in connection with his routine duties as Superintending Engineer and those persons started making wrong reports against him. On the 4th January 1950 the U. P. Government addressed a letter no. 43 B/XIII—

277 B 1948 to the Chief Engineer Irrigation Branch, U P asking for the applicant s explanation in respect of certain charges The charges related to certain alleged excess payments by him to certain contractors which in the opinion of the Government, were unjustified One of the charges however related to dishonest conduct

The applicant submitted his explanation to the charges to the Chief Engineer It appears that thereafter the Chief Engineer sent his own note in reply to the applicant s explanation to the Union Public Service Commission which decided that the charge relating to dishonesty was not proved while the other charges were proved On the arrival of this report the President of India passed an order on the 17th of April 1953 compulsorily retiring the applicant from service with effect from the date of the handing over of the charge by the applicant Before the order could be served on him the applicant made an application to this Court under Article 226 of the Constitution praying that a writ of *certiorari* be issued quashing the President s order dated the 17th April 1953 ordering the compulsory retirement of the petitioner In this petition he alleged that the order had not yet been served on him and that it might be served on him at any time He prayed for an *ad interim* order directing the opposite parties namely the State of Uttar Pradesh and the Union of India to refrain from relieving the petitioner of his present post and from carrying into execution the aforesaid order The grounds on which the petition was based was that applicant was not given any reasonable opportunity to show cause against the action proposed to be taken against him that he was merely asked to submit an explanation which he did but was not given an opportunity of controverting by evidence and argument he charges which were levelled against him or the remarks which were

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made against him by the Chief Engineer. When this application was presented to us we considered that a *prima facie* case had been made out and acceded to the request for the grant of an interim order and directed that the order of 17th April, 1953 be not carried into effect till the decision of this petition. Later on, the representation of the Advocate General on behalf of the State, the interim order was modified and we directed that the Government may not if they like take any work from the applicant but may pay him the salary till the decision of the application. We understand that the applicant has been drawing his salary during this time.

We have now heard learned counsel on both sides and we have come to the conclusion that the applicant is not entitled to the relief claimed by him. The applicant relies upon Article 311 of the Constitution. That Article provides:—

> No person who is a member of a civil service of the Union or an all India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.
>
> (2) No such person as aforesaid shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him.

There is a proviso to sub-article (2) which is not relevant for the purpose of the present case. In substance Article 311 provides a two-fold protection to an employee in the civil service of the Union or of a State (*a*) that such an employee shall not be dismissed or removed by an authority subordinate to that by which he was appointed and (*b*) that such an employee

shall not be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. The applicant's case is that he was removed from service and as such he was entitled to a reasonable opportunity of showing cause against his removal which he was not given.

The alleged removal of the applicant was under paragraph 465A of the Civil Service Regulations which provides as follows:

> For officers mentioned in Article 349A the rule for the grant of retiring pension is as follows:
>
> (1) An officer is entitled, on his resignation being accepted, to a retiring pension after completing qualifying service of not less than twenty five years or in the case of officers of Imperial Services of the Forest, Geological Survey, Public Works, Railway and Telegraph Departments and any others covered by Article 635 who entered the service before the 6th day of December 1932 not less than twenty years.
>
> (2) A retiring pension is also granted to an officer who is required by Government to retire after completing twenty five years qualifying service or more.

Then there are two notes to this paragraph. Note 1 reads:—

> Government retains an absolute right to retire any officer after he has completed twenty five years qualifying service without giving any reasons and no claim to special compensation on this account will be entertained. This right will not be exercised except when it is in the public interest to dispense with the further services of an officer.'

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Agarwala, J.

It is not necessary to quote Note 2

The applicant was, according to him removed under sub paragraph (2) of paragraph 465 A read with Note 1 The applicant had completed 25 years of qualifying service He had not attained the age of 55 years which is an age of superannuation and which he would do on the 10th of January 1955 Retirement under this rule does not entail any reduction in the pension which the applicant may be entitled to It is conceded in the present case that no such reduction was ordered in his case and no other punishment was inflicted on him

On behalf of the opposite party it is alleged that a compulsory retirement under paragraph 465 A is not removal within the meaning of Article 311 of the Constitution and further that even if it be so the applicant was given a reasonable opportunity of showing cause against his removal inasmuch as he was asked to submit an explanation which he did and nothing more, in the circumstances of the case was necessary to be done

Therefore two questions fall for decision (1) whether removal within the meaning of Article 311 includes retirement as may be ordered under paragraph 465 A of the Civil Service Regulations and (2) whether if removal includes retirement under that paragraph a reasonable opportunity was given to the applicant? A third question also arises in the case and it is whether paragraph 465 A is a valid rule or regulation and whether it is applicable to the applicant

The word "removal" means in its dictionary meaning displaced" or "discharge from a certain position In its widest scope it would include every kind of displacement of a person from a post he holds It would,

therefore, also in that sense include a compulsory retirement on the attainment of the age of superannuation under rule 56 of the Fundamental Rules It may also be said that it would include, in that larger sense, the termination of the service of an employee for any reason whatever, for instance on the expiry of his term of office which he held It is obvious that a wide meaning such as this cannot be given to the word removal as used in Article 311 of the Constitution The Article requires that a reasonable opportunity is to be given to an employee to show cause against the action proposed to be taken against him There can be no question of showing cause when a service is terminated, because a person has attained the age of superannuation, or because his term of service which he could hold under a contract under which he was employed expires In all these cases the action of terminating an employee s service is taken not because of any misconduct or fault of the employee but because his term of office has come to an end by the automatic operation of some rule applicable to him or by some term of the contract of his service A person can be asked to show cause against an action proposed to be taken against him, if the action proposed to be taken against the applicant is of such a nature that it may possibly be avoided if properly explained If the termination of service is ostensibly not for any fault of the employee no question of explanation can arise Therefore, it must be held that removal within the meaning of Article 311 must refer to a removal which is for some fault, or misconduct of the employee himself which he may try to explain The word 'removal' is not used in its widest connotation in Article 311, as has recently been laid down by the Supreme Court in *Satish Chandra Anand* v *The Union of India* (1) In that case a temporary employee s term of service was terminated by means of a notice as required by the terms of the contract of his service The Supreme Court pointed out that such termination of

(1) A I R 1953 S C 250

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service did not amount to removal within the meaning of Article 311. We have, therefore, necessarily to put some limitation on the connotation of the word removal in Article 311. Under paragraph 465A of the Civil Service Regulations, there may be compulsory retirement of a person who has completed 25 years of qualifying service. On completion of that period of service the employee is granted full pension, as would be available to him after completing that period of service, and he is entitled to all emoluments as he would be entitled to if his services were terminated at that particular point of time. With the exception of the fact that he may stand to lose monetarily by a premature retirement from service he suffers no other stigma. But the difficulty that arises is that paragraph 465A itself provides that this premature retirement of an employee will not be made unless it is in the public interest to do so.

The argument on behalf of the applicant is that this is tantamount to saying that the employee is blameworthy or at any rate has some defect or disqualification for which he is compulsorily retired under that paragraph and it is urged that for that reason it is natural and just that he should be afforded reasonable opportunity of showing why he should not be prematurely retired and put on a level different from his compeers in the service. We have given our best consideration to this matter and although much can be said for either view we have finally come to the conclusion that the contention advanced on behalf of the State is the correct one and must be accepted. A little consideration of the history of the rule enacted in Article 311 of the Constitution would confirm this conclusion.

Before the Government of India Act 1919 there was no restriction on the power of the Crown to dismiss a servant employed in the civil service, at pleasure.

The general English rule was that servants of the Crown could be dismissed at the pleasure of the Crown There was only one exception to this rule and it was this that where an appointment was made under an Act of Parliament providing dismissal for good cause the servant could not be dismissed at pleasure This distinction between the two classes of cases was pointed out by the Privy Council in *R Vankatarao v Secretary of the State* (1) where their Lordships quoted the opinion of Lord HOBHOUSE as delivered in *Shenton v Smith* (2)—

> It appears to their Lordships that the proper grounds of decision in this case have been expressed by STONE, J in the Full Court They consider that unless in special cases where it is otherwise provided servants of the Crown hold their offices during the pleasure of the Crown not by virtue of any special prerogative of the Crown but because such are the terms of their engagement as is well understood throughout the public service If any public servant considers that he has been dismissed unjustly his remedy is not by a law suit but by an appeal of an official of political kind As for the regulations their Lordships again agree with STONE J that they are merely directions given by the Crown to the Governments of Crown colonies for general guidance, and that they do not constitute a contract between the Crown and its servant

A special case such as was contemplated in the above cited passage occurred in *Gould's case (Gould v Stuart)* (3) where the Board consisting of three members two of whom had sat in *Shenton's* case held that the respondent Stuart held office in New South Wales under certain conditions expressly enacted in the body of the New Wales Civil Service Act 1884 and that these express

(1) I L R [1887] Mad 582 (2) L R [1893] A C 229
(3) L R [1896] A C 575

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provisions of the statute were inconsistent with importing into the contract of service the term that the Crown may put an end to it at its pleasure

This rule was applied to servants in the employ of the East India Company (G Gibson v The East India Company (1) After the resumption of the Government of India by the Crown the same rule continued to be in force up to 1919 when the Government of India Act was amended by the insertion of section 96B That section imposed one restriction upon the dismissal of a civil servant at the pleasure of the Crown The restriction was that no civil servant might be dismissed by any authority subordinate to that by which he was appointed Subject to this there was no restriction upon the power of the Crown to dismiss any person in the Civil Service at pleasure Section 96B however made reference to the rules made by Government and while enacting the rule that the Crown could dismiss a person in Civil Service at pleasure, it made it subject to the provisions of this Act and of the rules made thereunder Courts in India differed as to the precise scope of this phrase One view was that the power of the Crown to dismiss at pleasure was not unqualified but was subject to the provisions of the rules applicable to the service to which the person concerned belonged The other view was that these rules and regulations did not limit the power of the Crown to dismiss a servant at pleasure but were merely rules of administration which would ordinarily be observed by the Executive Government but it was not observed, itself conferred no right which could be enforced in a court of law by a dismissed servant The matter went up to the Privy Council in two cases (*Venkata Rao* v *Secretary of State*) to which a reference has already been made and *Rangachari* v *Secretary of State* (2) In both of these cases the Privy

(1) (1838) 5 B N Cases 262 (2) I L R [1937] Mad 517

Council upheld the latter view namely that the phrase subject to the provisions of this Act and of the rules made under the Act did not limit or qualify the unfettered discretion of the Crown to dismiss a servant in the Civil Service at pleasure that the remedy for the violation of the rules and regulations was political and not legal In the Government of India Act 1935 the position was altered Under that Act over and above the restriction on the pleasure of the Crown to dismiss a civil servant at pleasure which was already embodied in section 96B another restriction was imposed and it was that a civil servant could not be dismissed or reduced in rank unless the person concerned was given a reasonable opportunity of showing cause against the action proposed to be taken against him By this provision what was embodied in some of the rules was given a statutory recognition Under rule 55 of the Civil Service (Classification Control and Appeal) Rules which were made under the provisions of the Government of India Act 1919 a government servant in the civil service of the Crown was entitled to get a reasonable opportunity of defending himself against the action proposed to be taken against him A similar provision was included in section 240 of the Government of India Act 1935 and the right of opportunity being given for showing cause was thus given a statutory recognition Henceforth the power of the Crown to dismiss a servant at pleasure which meant without giving any opportunity to the dismissed servant was no longer unfettered The rule which had merely administrative or political efficacy having now been given statutory recognition imposed a statutory fetter on the power of the Crown to dismiss a servant at pleasure but the cases to which the fetter applied were of (*a*) dismissal and of (*b*) reduction in rank The word

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removal was not used in the Government of India Act 1935

Under rule 49 of the Civil Service (Classification Control and Appeal) Rules several kinds of punishments could be inflicted for good and sufficient reason on a civil servant These included dismissal reduction in rank and also removal The distinction between dismissal and removal was that while dismissal entailed a liability upon a dismissed servant not to be able to seek a government service again removal did not have that effect In the case of removal government servant could be granted under rule 353 or 353A Civil Service Regulations a compassionate allowance or even pension but to a reduced extent Upon dismissal there was no question of the grant of any pension Removal was as used in rule 49 by way of punishment A question arose under the Government of India Act 1935 whether the statutory protection afforded by section 240 in case of dismissal and reduction in rank also extended to the case of removal though the word removal was not used in that section In *High Commissioner for India* v *I M Lall* (1) Mr I M Lall, a member of the Indian Civil Service was removed from the Indian Civil Service but not dismissed in the technical sense The Privy Council considered the provisions of section 240 sub section (3) as applicable to the case of removal as well which word was assumed to be comprised within the word dismissal

When the present Constitution was framed, in addition to the word dismissal an opportunity was taken to add the word removal after the word dismissal and before the phrase reduction in rank As the phrase stands now Dismissal removal and reduction

(1) A I R 1948 P C 121

in rank it reminds us of the identical phrase used in rule 55 of the Civil Service (Classification Control and Appeal) Rules Rule 55 says

> Without prejudice to the provisions of the Public Servants Inquiries Act, 1850, no order of *dismissal, removal* or *reduction* shall be passed on a member of a service (other than an order based on facts which had led to his conviction in a criminal court or by a court martial) unless he has been informed in writing of the grounds on which it is proposed to take action and has been afforded an adequate opportunity of defending himself

This rule follows rule 49 which prescribes the penalties which may for good and sufficient reason, be imposed upon members of the services There can be no doubt whatsoever that the phrase dismissal, removal or reduction as used in rule 55 has reference to dismissal, removal and reduction in rank which are three out of several penalties provided in rule 49 In the Civil Service Regulations there are rules providing for pension in case of removal from service Rules providing for pension on removal of a person *inter alia*, are rules 353 and 353A Rule 353 deals with pension when a person is removed for misconduct inefficiency or insolvency The rule says that—

> no pension may be granted to an officer dismissed or removed for misconduct insolvency or inefficiency but to officers so dismissed or removed compassionate allowances may be granted when they are deserving of special consideration provided that the allowances granted to any officer shall not exceed two thirds of the pension which would have been admissible to him if he had retired on medical certificate"

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Rule 353A deals with pension when a person is removed from service when found unfit for further advancement It says that—

> a person belonging to one of the following services who is proved to be unfit for further advancement is removed from service by the Secretary of State on the recommendation of the local Government and the Government of India he may with the sanction of the Secretary of State be granted a pension not usually exceeding and not necessarily so great as that which would have been admissible to the officer if he had been invalided on medical certificate

Removed from service under rule 353A is also spoken of as compulsory retirement but this has nothing to do with retirement under rule 465 A

Retirement under the rules is of two kinds (*a*) retirement on reaching the age of superannuation which is fixed at 55 and in some cases at 60 and (*b*) retirement on completion of 25 years of service This last is dealt with in rule 465A which we have already quoted

Retirement under both these provisions is not spoken of as removal in any of the rules It is conceded that retirement on reaching the age of superannuation is not removal within the meaning of Article 311 The essential difference between removal by way of penalty as provided for in rule 49 and other rules and retirement on attainment of period of qualifying service as provided for in rule 465A is that while removal under rule 49 and the other rules is always by way of penalty retirement under rule 465A is not at all by way of penalty The reasons for which a person may be retired under rule 465A are not specifically mentioned in that rule The general reason given is that it is not in the public interest to retain

the services of the officer concerned any longer The reason why a person's continuance may not be in the public interest may be wholly unconnected with any misconduct or fault on his part It is true that the retirement under rule 465A may be taken recourse to because of some misconduct or fault of an officer who has already put in 25 years of service but the question is whether the retirement contemplated under that rule is intended to be by way of punishment or not

It has to be noted that rule 465A speaks of retirement after completion of a sufficiently long service If it were intended to be a provision by way of punishment it could one would have thought be applicable to a person at any period of his service The compulsory retirement after a sufficiently long period of service is to our mind of the class of retirement upon the attainment of a particular age that is to say the age of superannuation This is not to say that the two retirements are identical No doubt they are different retirements—one at the age of superannuation which is common to everybody and the other at an earlier age but even in the first case a servant can be retained in service for a further term for reasons to be recorded Retirement under rule 465A is to be for some reason i e the retention of the servant concerned not being in the public interest, and yet when all this has been said the two sorts of retirements are essentially different from the removal spoken of in rule 49 or which may be imposed by way of penalty or punishment The effect of rule 465A and the fundamental rule 56 taken together is that civil servants normally retire at the age of 55 that their services may be retained for special reasons to be recorded and similarly their services may be terminated earlier after completion of 25 years of service for special reasons In our opinion though rule 465A is on the border line between the rule of removal in rule 49 and retirement

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under the fundamental rule 56, it partakes more of the nature of retirement under fundamental rule 56 than of removal under rule 49. Juxtaposition of the words dismissal, removal and reduction in rank in Article 311 shows that removal is of a quality similar to dismissal and reduction in rank as removal is sandwiched between dismissal and reduction in rank both of which are punishments.

In our opinion, removal also therefore, appears to be by way of punishment. Consequently, it must be held that a retirement under rule 465A is not comprised within the word removal in Article 311.

This view is consistent with almost all the cases decided so far by the various High Courts in India except one court. The cases in support of this view are *Jayanti Prasad* v. *The State of Uttar Pradesh* (1). Delivering the judgment of the Bench it was observed by one of us—

> Article 311 applies only to a case in which a person is dismissed or removed or reduced in rank. These are technical words used in cases in which a person's services are terminated for misconduct. They do not apply to cases in which a person's period of service determines in accordance with the conditions of his service.

The same view was taken in *Kewalmal Singh* v. *Heta Ram* (2), *State of Saurashtra* v. *Bholanath Jatashanker Thakkar* (3) and *Chittoor Varadaraja Iyer Narayana Iyer* v. *The State of Travancore Cochin* (4). The decision in *C. Sambandam* v. *The General Manager, South Indian Railway* (5) is not contrary to the view that we have taken. In that case a wireman of the South Indian Railway was served with a notice under rule 3 of the Railway Services (Safeguarding of National Security) Rules 1949 and he was dismissed under that rule. The

(1) I.L.R. (1952) 2 All. 847. (2) A.I.R. 1952 Raj. 17.
(3) A.I.R. 1952 Sau. 49. (4) A.I.R. 1953 T.C. 140.
(5) A.I.R. 1953 Mad. 54.

rule itself provided for termination of services of a p r son who was engaged in subversive activities The servant was given an opportunity to show cause against the charge framed against him but he contended that he was not given a second opportunity for showing cause against the action proposed to be taken against him He therefore applied under Article 226 of the Constitution alleging that his dismissal was contrary to the provisions of Article 311 In argument it was urged on behalf of the State that under rule 148(4) of the Indian Railway Establishment Code services could be terminated by giving a notice after a certain period but the court held that the services of the employee were not terminated under rule 148(4) though they could have been, and as they were terminated under rule 148(3) and no second opportunity for showing cause against the action was given to him his dismissal was irregular The facts of the present case are wholly dissimilar to the facts of that case The only High Court which has taken a different view is the Pepsu High Court in three cases namely *K R Ramn Iyer* v *The State* (1) *Ishar Das Mehta* v *The State of Pepsu* (2) *Shambhu Dayal* v *Patiala and East Punjab State Union* (3) and *S Anup Singh* v *The State* (4) These were all cases decided before the decision of the Supreme Court in *Satish Chandra s* case (5) The view taken was that the word removal includes a compulsory retirement under a rule of the State of Pepsu similar to that embodied in rule 465A The context in which the word removal is used and the source from which it is taken and the history of rule were not referred to The main ground of decision was that there was no reason why the word removal should not be treated to have been used in its larger sense We have already shown the reason

(1) A I R 1962 Pep 69 (2) A I R 1952 Pep 148
(3) A I R 1952 Pep 152 (4) A I R 1953 Pep 24
(5) A I R 1953 S C 250

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why it could not be taken to have been used in its larger sense and why it should be confined to cases in which removal is by way of punishment or penalty The discussion of the word removal in *Satish Chandra's* case clearly supports our view that the word removal was intended to import the idea of punishment or penalty

This leads us to the other part of the argument of the learned counsel for the applicant According to him, rule 465A was not validly made and is not a statutory rule at all and therefore the applicant s removal under that rule is invalid His argument is that the Civil Service Regulations in which rule 465A occurs were not made by the Secretary of State for India in Council and only the rules made by the Secretary of State in Council could apply to the applicant who was appointed by him to the All India Service of Engineers and as such his removal was illegal Before the Government of India Act 1919 came into force certain rules and regulations applicable to the civil servants of the Crown in India had been made by various authorities As these rules and regulations were not made under any statutory power it was doubted whether they were of any legal validity It was therefore provided in sub section (4) to section 96B of the Government of India Act 1919 as follows

> For the removal of doubts it is hereby declared that all rules or other provisions in operation at the time of the passing of Government of India Act 1919 whether made by the Secretary of State in Council or by any other authority, relating to the civil service of the Crown in India were duly made in accordance with the powers in that behalf, and are confirmed but any such rules or provisions may be revoked varied or added to by rules or laws made under this section

Thus all rules and regulations and other provisions which were in operation at the commencement of the Government of India Act 1919 were validated and recognized as statutory If rule 465A was in force at that time it was validated under sub section (4) to section 96B It has however not been shown to us that this rule was in force at that time All that has been shown to us is that in 1922 rule 465A was amended When it was actually made is not known The rule as it appears in its present form was finally adopted in the year 1922 It could not therefore be said to have been validated and made statutory by sub section (4) of section 96B of the Government of India Act 1919 Under sub section (2) of that section the Secretary of State in Council was empowered to make rules for regulating the classification of the civil services in India the methods of their recruitment their conditions of service pay and allowances and discipline and conduct He was also empowered to delegate the power of making rules to the Governor General in Council or to local Governments or authorize the Indian legislatures or local legislatures to make laws regulating the public services This sub section did not empower the Secretary of State in Council to delegate any power concerning rules relating to pensions The power to make rules regarding pension was contained in sub section (3) of that section That sub section provided that the right to pensions and the scale and conditions of pensions of all persons in the civil service of the Crown in India appointed by the Secretary of State in Council shall be regulated in accordance with the rules in force at the time of the passing of the Government of India Act 1919 Any such rules may be varied or added to by the Secretary of State in Council and shall have effect as so varied or added to but any such variation or addition shall not adversely affect the pension of any member of the

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service appointed before the date thereof This sub section did not empower the Secretary of State in Council to delegate his power to make rules regarding the pension to any other authority and as we have already noted it has not been shown to us that rule 465A was in existence at the commencement of the Act of 1919 Therefore subject to what follows rule 465A which in its present form was made in 1922 could not be said to have been a statutory rule or a rule made by the Secretary of State in Council binding on the applicant as such The Secretary of State for India in Council however made certain other rules from time to time under sub sections (2) and (3) of section 96B These rules appear in two classes (a) the Civil Service (Classification Control and Appeal) Rules which were first made in December 1920 and were modified from time to time and ultimately published as rules of 1930 and modified subsequently as well and (b) Fundamental Rules These latter are contained in section 2 of the compilation entitled Fundamental Rules and the supplementary rules issued by the Government of India in 1949 III Edition

In rule 7 of the Civil Service (Classification Control and Appeal) Rules it is stated—

> Where by these rules power is delegated to or conferred upon any authority to make rules regulating the classification the methods of recruitment the conditions of service the pay allowances and pensions or the discipline and conduct of any class of the Civil Services specified in rule 14 the rules, notifications and orders, by whatsoever authority made regulating these matters in respect of that class which were in operation on the date these rules were made shall remain in operation except in so far as they may be inconsistent with these rules or may be specifically cancelled or modified in exercise

of the aforesaid power by the authority to which it is delegated'

Rule 26 of these rules lays down

> Rules regulating the conditions of service the pay and allowances and the pensions of members of the All India Services shall be made by the Secretary of State in Council

Since by rule 26 of the aforesaid rules the Secretary of State in Council is conferred the power of making rules for regulating the conditions of service the pay allowances and pension of members of the All India Services and he validated by rule 7 the previous rules by whatsoever authority made which were in operation on the date these rules were made, that is to say in 1950 they must be taken to have been recognized as valid by rule 7 Rule 7 therefore in our opinion impressed the stamp of validity upon the Civil Service Regulations applicable to the all India services in respect of conditions of services, pay allowances and pensions that were in force in 1950 This would include rule 465A of the Civil Service Regulations It follows therefore that rule 465A of the Civil Service Regulations had become a valid rule as if it were made by the Secretary of State in Council when the action was taken against the applicant

Reference was made in this connexion by learned counsel for the petitioner to section 247 of the Government of India Act read with section 250 thereof

Section 247 laid down the conditions of service of all persons appointed to a civil service or a civil post by the Secretary of State and section 250 laid down that the provisions of the last four preceding sections including section 247 and any rules made thereunder shall apply to any person who was appointed before the commencement of Part III of this Act by the Secretary of State in Council to a civil service of, or a civil post under the

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Crown in India as they apply to persons appointed to a civil service or civil post by the Secretary of State

Section 247 referred to persons appointed after commencement of the Act of 1935 and the effect of rule 250 was that the rules made by the Secretary of State in Council regulating the conditions of service of all persons appointed after the commencement of the Act of 1935 were to apply to persons who had already been appointed before the commencement of Part III of the Act by the Secretary of State in Council

The effect of these sections was therefore merely to apply rules made by the Secretary of State in Council after the commencement of the Act of 1935 to persons appointed by the Secretary of State in Council both before and after the commencement of the Act of 1935 We are here not concerned with any rule made by the Secretary of State in Council under section 245 after the commencement of the Act of 1935 We are here concerned with rule 465A which was made before the commencement of the Act of 1935 and which had been taken by the Secretary of State in Council as a rule having been made by himself and validated as such by rule 7 of the Civil Service (Classification Control and Appeal) Rules as already stated It cannot therefore be said that rule 465A of the Civil Service Regulations was invalid or not applicable to the applicant by reason of its not having been made by the Secretary of State in Council

It was next urged that rule 465A did not apply to the service to which the applicant belonged namely to the All India Service of Engineers This contention was based upon rules 649 and 650 of the Civil Service Regulations Rules 649 and 650 are embodied in Chapter XXX of the Civil Service Regulations which are applicable to Civil Engineers and Telegraph officers

Section III of this Chapter relates to compulsory retirement Rules 649 and 650 are in this section Rule 649 says

> The compulsory retirement of Civil Engineers of the Public Works Department or the Engineering Department of State Railways who are proved to be unfit for further advancement is regulated by Article 353A But any Civil Engineer of these Departments who on reaching the age of 50 years has not attained the rank of Superintending Engineer is liable to be called on to retire by the Government of India

Rule 650 says

> All Civil Engineers in the Public Works and Railway Departments Civilian Under Secretaries in the Public Works Secretariat of the Government of India or of a Local Government or Administration and Civilians in the Superior Railway Revenue Establishment and in the Superior Establishment of the Telegraph Department are required to retire on attaining the age of 55 years

Rule 650 is clearly a rule of retirement at the age of superannuation which is fixed as 55 years Rule 649 is a rule of compulsory retirement before attaining that age—firstly on the ground of unfitness for further advancement as regulated by Article 353A and secondly on reaching the age of 50 years provided the person concerned has not attained the rank of Superintending Engineer As the applicant had attained the rank of Superintending Engineer the second part of rule 649 does not apply to him The first part of the rule does apply to him so does rule 650

The argument is that since the first part of rule 649 which regulates premature compulsory retirement

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before the attainment of the age of superannuation as applicable to members of the Service of Civil Engineers is specially provided for the general rule embodied as applicable to all services including the All India Services of Civil Engineers as embodied in section 465A, Civil Service Regulations would not apply to the All India Service of Civil Engineers It is pointed out that where a special rule is provided in a statute or body of rules, this special rule has to be given preference to a general rule on the same subject The proposition of law thus enunciated by learned counsel for the applicant is undoubted but it does not apply to the present case for the simple reason that rule 649 does not deal with the subject which is dealt with in rule 465A Rule 649 deals with compulsory and premature retirement for a special cause unfitness for further advancement which is dealt with in rule 353A of the Civil Service Regulations

Rule 465A on the other hand is a rule of retirement after completion of 25 years of service, when it is considered that his retention in the service is not in the public interest The two rules deal with different matters though both of them may apply in the case of a particular individual at one and the same time We do not think that rule 465A is at all affected by rule 649 in the case of Civil Service of Engineers

Then it was said that rule 465A must be deemed to have been abrogated or cancelled by rule 65 of the Fundamental Rules Rule 56 provides for compulsory retirement on the attainment of the age of superannuation which has been fixed at 55 years It also provides that a person may be retained in service after that age up to the age of sixty if he continues to be efficient He must not be retained in service after that date except in very rare circumstances and with the

sanction of the local Government The rule also provides for compulsory retirement of Civil Engineers of the Public Works Department who have reached the age of 50 years They may, however be required by Government to retire on reaching the age of 50 years if they have not attained to the rank of Superintending Engineer Rule 55 does not deal with the subject matter which is dealt with in rule 465A and it cannot therefore be said that by reason of rule 55 rule 465A should be deemed to have been cancelled or abrogated

It was urged on behalf of the State by the learned Advocate General that even if Article 311 of the Constitution applied to the case of retirement under rule 465A reasonable opportunity was in fact given to the applicant by this Court His case was that Article 311 speaks of only one opportunity to be given at the time of imposing punishment It does not speak of any opportunity being given at the time of investigation of the charges against the person concerned In support of his argument learned Advocate General referred to certain observations in *I M Lall's* case (1) In that case their Lordships pointed out that—

> Sub section (3) of section 240 of the Government of India Act 1935 was not intended to be and was not a reproduction of rule 55 Civil Services (Classification Control and Appeal) Rules framed under section 96B Government of India Act 1919 which was left unaffected as an administrative rule Rule 55 is concerned that the civil servant shall be informed of the grounds in which it is proposed to take action and to afford him an adequate opportunity of defending himself against charges which have to be reduced to writing, this is in marked contrast to the statutory provision of

(1) A I R 1948 P C 122

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a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. No action is proposed within the meaning of the sub-section until a definite conclusion has been come to on the charges and the actual punishment to follow is provisionally determined on. Prior to that stage the charges are unproved and the suggested punishments are merely hypothetical. It is on that stage being reached that the statute gives the civil servant the opportunity for which sub-section (3) makes provision. There is no difficulty in the statutory opportunity being reasonably afforded at more than one stage. If the civil servant has been through an enquiry under rule 55 it would not be reasonable that he should ask for a repetition of that stage if duly carried out; for that would not exhaust his statutory right and he would still be entitled to represent against the punishment proposed as the result of the findings of the enquiry.

It was argued on the basis of this observation that under Article 311 (2) the reasonal opportunity which is required to be given is against the action proposed to be taken which means against the punishment proposed to be imposed and that since it was not necessary to give any opportunity to lead evidence or to defend oneself by tendering evidence or advancing argument it was enough that an opportunity of submitting an explanation was given which was condoned in the present case.

It was urged that the phrase "showing cause" does not necessarily imply that any opportunity over and above the opportunity of submitting an explanation need be given. This contention in our opinion is not well founded. The phrase "showing cause" has

been the subject matter of discussion in more than one case in this Court In *Avadhesh Pratap Singh v State of U P* (1) it was held that where an opportunity is required to be given of showing cause the opportunity must be adequate Enabling a mere representation to be made is not the same thing as giving an opportunity of showing cause The expression showing cause was considered to connote an opportunity of leading evidence in support of one s allegations and in controverting such allegations as are made against one This was followed in *Ravi Pratap Narain Singh v The State of Uttar Pradesh* (2) In that case the argument now advanced before us on the basis of the observation made by the Privy Council in *I M Lall's* case was also advanced but it was rejected and the Bench deciding that case dealt with this observation in the following words

> It cannot be held that their Lordships ever meant to say that at the subsequent stage when a civil servant was called upon to show cause under sub section (3) of section 240 Government of India Act 1935 he need not be given any opportunity at all to give evidence All that their Lordships said was that it would not be reasonable that the civil servant should ask for a repetition of the enquiry that had already been made under rule 55 if that enquiry had been duly carried out This remark does not exclude the right of a civil servant to give any evidence which he may not have been appropriately required to give at the stage of the earlier enquiry under rule 55 In fact the remark that it would not be reasonable that a civil servant should ask for a repetition of the enquiry held under rule 55 would appear to

(1) I L R [1952] 2 All 783 (2) I L R [1952] 2 All 949

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contain an implication that if there had not been earlier enquiry duly carried out it would have been held that the civil servant had a right at this subsequent stage to adduce evidence when showing cause why the proposed action should not be taken against him. The views of their Lordships of the Privy Council in that case therefore only go to confirm our view.

We respectfully agree with this view. In our opinion the expression "showing cause" as used in Article 311 does not imply that a mere opportunity of submitting an explanation is enough. It implies that adequate opportunity of leading evidence in support of the contentions of the person concerned and controverting the contentions raised against him must be given, and where necessary opportunity of cross-examining witnesses of the other side and of addressing arguments should also be afforded. No such thing was done in the present case.

Though reasonable opportunity of showing cause against the action proposed to be taken against the applicant was not given, the order of the 17th of April 1953 having been passed under the provisions of rule 465A of the Civil Service Regulations, no such opportunity was necessary because the compulsory retirement contemplated under that rule is not covered by Article 311 of the Constitution.

The result, therefore, is that this application fails and is dismissed. In the circumstances we direct the parties to bear their own costs.

Mr. *Gopi Nath Kunzru* on behalf of the petitioner prays that a certificate may be given to the applicant to the effect that the case involves a substantial question of the interpretation of the Constitution and is otherwise a fit one for appeal to the Supreme Court. We think

that the case involves a substantial question of the interpretation of the Constitution and we also think that it is otherwise a fit case for appeal to the Supreme Court We therefore grant the certificate prayed for

Order accordingly

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CIVIL MISCELLANEOUS

Before Mr Justice Desai and Mr Justice Mukerji

DURGESHWAR DAYAL SETH (APPLICANT)

v

THE SECRETARY BAR COUNCIL ALLAHABAD AND OTHERS (OPPOSITE PARTIES)

1953 October 22

Bar Councils State Amendment Act, 1950, *if ultra vires the Uttar Pradesh State Legislature—High Courts Amalgamation Order 1948 cl 17(c)—Whether contemplates creation of a new Bar Council*

The Bar Councils State Amendment Act is *ultra vires* the Uttar Pradesh State Legislature as Parliament has the exclusive power to make laws with respect to matters included in Entry no 78 of List I in view of Art 246 of the Constitution of India

Cl 17(c) of the Amalgamation Order does not contemplate the creation of a new Bar Council and preparation of a new roll of Advocates of the new High Court

Case law discussed

Civil Miscellaneous No 53 of 1953

The facts appear in the judgment

A P Pandey, Gopal Behari and *S K Verma* for the applicant

The Advocate General (*K L Misra*) for the opposite parties

DESAI, J —This is an application by Sri Durgeshwar Dayal Seth for the issue of a writ of *mandamus* to the opposite parties directing them to include his name in

the new roll of Advocates without his paying any sum of money The application is opposed by all the three opposite parties

The applicant who was called to the Bar on the 18th November 1939 enrolled as an Advocate of the High Court of Judicature at Allahabad on the 23rd February 1938 and his name was duly entered on the roll of Advocates of the same High Court under section 8(2) (*b*) of the Indian Bar Councils Act 1926 He has been practising regularly in the High Court In 1948 the Governor General issued the United Provinces High Courts Amalgamation Order 1948, amalgamating the High Court of Judicature at Allahabad and the Chief Court of Avadh and establishing a new High Court though bearing the old name of the High Court of Judicature at Allahabad and giving a right to all Advocates who were entitled to practise either in the High Court at Allahabad or the Chief Court of Avadh to practise in the new High Court The State Legislature of Uttar Pradesh amended the Indian Bar Councils Act 1926 in 1950 The effect of the amendment was that the old Bar Councils of Allahabad and Avadh were dissolved and provision was made for the creation of a new Bar Council for the new High Court The State Government purporting to act under section 3 of the Indian Bar Councils Act issued a notification on the 24th May, 1952 applying the provisions of sections 7 to 16 of the Bar Councils Act to the new High Court with immediate effect The State Amendment Act provided that until a Bar Council had been established for the new High Court the Chief Justice could establish an *ad hoc* Bar Council Accordingly an *ad hoc* Bar Council was established by the Chief Justice Its Secretary issued a notice on the 5th January 1953 demanding a sum of Rs 10 from the applicant and other Advocates for entering their names in the new list of Advocates to be pre-

pared by the new High Court Another notice was issued by the Joint Registrar of the new High Court informing the applicant that unless he paid the sum of Rs 10 his name would not be placed on the new roll of Advocates The petitioner contends through this application that he has already paid the sum of Rs 10 when he got his name entered on the roll prepared for the old High Court of Judicature at Allahabad that he cannot be required to pay the sum again that it is the duty of the new High Court to include his name on the new roll of Advocates without demanding any payment from him and that he is entitled to be recognized as an Advocate of the new High Court and to practise there It was further contended that the State Amendment Act of 1950 was *ultra vires* the State Legislature

The Secretary of the *ad hoc* Bar Council opposite party no 1, has filed a written statement opposing the application He maintained that the notice demanding Rs 10 from the applicant is correct and that the applicant is bound to pay the amount if he wants his name to be entered in the new roll He added however, that his duty was simply to accept the money that was paid to him and inform the Registrar of the fact of the payment and that the roll is to be prepared by the Registrar and not by himself

The Indian Bar Councils Act 1926 was enacted by the Indian Legislature to provide for the constitution and incorporation of Bar Councils for certain courts The Act extends to all the provinces of India Under section 1(2) it was made applicable to certain High Courts of Judicature including that at Allahabad and to such other High Courts within the meaning of clause (24) of section 3 of the General Clauses Act 1897 as the Provincial Government by notification in the official *Gazette* declare to be High Courts to which this Act applies Sections 1, 2 17, 18 and 19 of the Act came into force at once

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and by section 1(3) the Provincial Government was empowered by notification to direct that the other provisions of the Act would come into force in respect of any High Court to which the Act applies on such date as it may by the notification appoint The main provisions of the Act are as follows Under section 3 for every High Court a Bar Council would be constituted which was to be a body corporate having perpetual succession Section 8 lays down that no person shall be entitled as of right to practise in any High Court unless his name is entered in the roll of the Advocates of the High Court maintained under this Act and requires the High Court to prepare and maintain a roll of Advocates of the High Court In the roll are to be entered the names of all persons who were as Advocates etc, entitled as of right to practise in the High Court immediately before the date on which section 8 comes into force provided that they paid a fee, payable to the Bar Council of Rs 10 Also the names of all other persons who have been admitted to be Advocates of the High Court are to be entered in the roll on payment of such fee as may be prescribed The High Court is required to send to the Bar Council a copy of the roll This is also provided in section 8 The Bar Council is authorized to make rules to regulate the admission of persons to be Advocates of the High Court *vide* section 9 The High Court is given the power by section 10 to punish an Advocate for misconduct the enquiry into the allegation of misconduct is to be made by a committee of the Bar Council Every person whose name is entered in the roll of Advocates is entitled as of right to practise in the High Court of which he is an Advocate *vide* section 14 Power is given by section 15 to a Bar Council to make rules in respect of the rights and duties of the Advocates of the High Court and their discipline and professional misconduct When sections 8 to 16 are applied to any High Court, the Legal Practitioners Act

of 1879 stands amended to the extent and in the manner specified in the schedule of the Act and if there is any thing inconsistent with their provisions in the Letters Patent they are deemed to have been repealed to that extent

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On the passing of the above Act the Provincial Government issued a notification under section 1(3) applying the rest of the sections of the Act to the High Courts then existing the High Court of Judicature at Allahabad which (will be referred to as the old High Court) and the Chief Court of Avadh and Bar Councils were established for them The applicant got himself admitted as an Advocate on payment of the fee and his name was entered on the roll prepared by the old High Court of Allahabad Under section 14 he acquired the right to practise in the old High Court

By the Amalgamation Order of 1948 the old High Court and the Chief Court of Avadh were amalgamated and the two constituted one High Court (which will be known as the new High Court) bearing the same name as the old High Court Clause 8 of the Order provided that any person who was an Advocate entitled to practise in either of the High Courts would be recognized as an Advocate entitled to practise in the new High Court Clause 17 of the Order repealed the Letters Patent of the old High Court The last clause 18 is to the effect that the Order will have effect subject to any provisions that may be made with respect to the new High Court by any legislature or authority having power to make such provision

The effect of the Amalgamation Order was to create a new High Court as a substitute for the old High Court and the Avadh Chief Court The Order did not merely extend the territorial jurisdiction of the old High Court by adding to it the territory that was within the jurisdiction of the Avadh Chief Court

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though it did not expressly abolish the two courts that was the effect of the provision of clause 3 When the two High Courts were amalgamated to constitute a new High Court it meant that the two High Courts were abolished and in their place a new High Court was created By chance the new High Court was given the same name that was borne by the old High Court It could very well have been given a different name and then there could have been no doubt about the fact that a new High Court was created The Order disposed of both the Courts in the same manner if the Chief Court of Avadh was abolished or gone, the old High Court also was abolished or gone There was nothing in its provisions to suggest that only the Chief Court of Avadh was abolished and that the old High Court continued though with extended territorial jurisdiction The new High Court is to sit at Allahabad or at such other places in Uttar Pradesh as the Chief Justice may appoint The fact that it is to sit at Allahabad does not mean that it is a continuation of the old High Court

When the new High Court was created the Bar Councils Act had to be amended and at least a provision for the dissolution of the Bar Councils of the old High Court and the Chief Court of Avadh had to be made It is mentioned in the Statements of Objects and Reasons published in the *U P Gazette Extraordinary* dated the 23rd March 1950 that it was necessary to amend the Bar Councils Act partly for the purpose of providing for the dissolution of the old Allahabad and Avadh Bar Councils and partly to provide for the establishment of a Bar Council for the new High Court that the Indian Bar Councils (U P Amendment and Validation of Proceedings) Ordinance 1949 had expired and it was necessary to retain permanently on the statute book some of its provisions that opportunity was taken

to make some additional provisions in the Act to provide for a more representative and expanded Bar Council and to make it a permanent body and that since the establishment of a new Bar Council might take some time provision was made for an *ad hoc* Bar Council The important provisions of the Amendment Act are the following Section 3 dissolves the old Allahabad and Avadh Bar Councils with effect from 19th October 1949 and provides for the establishment of a Bar Council for the new High Court Until a Bar Council has been established for the new High Court the Chief Justice has been given power by section 5 to establish an *ad hoc* Bar Council Section 6 deletes the word Allahabad from section 1(2) of the principal Act and adds the words and the High Court of Judicature at Allahabad constituted by the U P High Court (Amalgamation) Order 1948 after the word Patna The effect of this amendment is to make the principal Act applicable to the new High Court Of course it was open to the Provincial Government to achieve that object by simply issuing a notification in the *Gazette* in exercise of the power conferred by that very provision declaring the new High Court to be a High Court to which the Act applies That act of the Provincial Government could not have been questioned on the ground of jurisdiction at all But presumably because the Provincial Government wanted to make amendments in the principal Act by providing for the matters enumerated above it decided to pass an Act instead of issuing a notification making it applicable to the new High Court Under section 1(2) of the principal Act it had no power to make any modifications in the Act the Act had to be applied to the new High Court as it stood or not at all Section 4 of the principal Act dealing with the composition of Bar Councils was amended as also section 5 dealing with election of members By section 9

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a new provision was made for the compulsory retirement of a certain percentage of members every third year Section 10 makes amendments in section 6 dealing with the rule making power of the High Court Section 11 validates all proceedings taken, orders made and jurisdictions exercised by the Allahabad Bar Council between the 26th July 1948 and the 26th March, 1950 Section 12 permits the continuation of all actions or proceedings commenced by or against the Allahabad and Avadh Bar Councils before the 19th October 1949 and pending on that date All property funds and assets belonging to the two dissolved Councils are transferred by section 13 to the Bar Council of the new High Court

The Amendment Act having been passed after the commencement of the Constitution its validity is to be tested by Article 246 Under that Article Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule and Parliament and the Legislature of any State have power to make laws with respect to any of the matters enumerated in List III List I is known as the Union List and List III as the Concurrent List The entry to be considered in List I is no 78 constitution and organization of the High Courts persons entitled to practise before the High Courts The Amendment Act is not said to be with respect to any of the matters mentioned in List II (State List) and therefore it is left out of consideration In List III there is entry no 26 legal medical and other professions The matters dealt with in the principal and the Amendment Acts undoubtedly come within entry no 26 of List III but it was contended on behalf of the applicant and denied on behalf of the opposite parties that the matters dealt with in the Amendment Act are included in entry no 78 of List I It was not disputed that according to the provisions of Article 246 if the

matters are included in entry no 78 of List I Parliament has the exclusive power to make laws with respect to them and the Amendment Act passed by the Provincial or State Legislature would be invalid The power of State to make laws with respect to any of the matters enumerated in List III is subject to the exclusive power of Parliament if it has any, to make laws with respect to the same matters If Parliament has the exclusive power a State cannot make laws even if the matters are enumerated in List III

The principles that a court has to bear in mind when deciding whether a legislation comes within an entry of one list or an entry of another list are well settled The problem always involves two questions one of the interpretation of the entries of the two lists and the other of what the legislation purports to do As regards the construction to be placed upon the entries in the rival lists it is to be assumed that the Union and the State lists do not conflict and every attempt should be made to avoid a conflict If necessary the meaning given to one entry should be restricted in order to avoid overlapping The meaning given to a general power in one entry may be restricted to give sense and efficacy to a power given by way of exception under an entry of another list At the same time general language ought not to be cut down by far fetched and impertinent limitations The words with respect to mean the whole field of legislation In the matter of the *Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act,* 1938 (1) the Federal Court held that the Act was *intra vires* the Provincial Legislature because it was with respect to taxes on the sale of goods entry no 48 of the Provincial List and not to duties of excise on tobacco and other goods manufactured or produced in India entry no 45

(1) A I R 1939 F C 1

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of List I of the Government of India Act GWYER C J on page 5 quoted the following from *Citizens Insurance Co. v. Parsons* (1)

> It could not have been the intention that a conflict should exist and in order to prevent such a result the two sections must be read together and the language of one interpreted and where necessary modified by that of the other In this way it may in most cases be found possible to arrive at a reasonable and practical construction of the language of the sections so as to reconcile the respective powers they contain and to give effect to all of them

On page 8 he observed that a reconciliation should be attempted between two apparently conflicting jurisdictions by reading the two entries together and by interpreting and where necessary modifying the language of one by that of the other He proceeded

> If indeed such a reconciliation should prove impossible then and only then will the *non obstante* clause operate and the federal power prevail for the clause ought to be regarded as a last resource a witness to the imperfections of human expression and the fallibility of legal draftsmanship

It has been shown that if each legislative power is given its widest meaning there is a common territory shared between them and an overlapping of jurisdictions is the inevitable result and this can only be avoided if it is reasonably possible to adopt such an interpretation as would assign what would otherwise be common territory to one or the other To do this it is necessary to construe this legislative power defined or described by one entry or the other in a more restricted sense than

(1) L R [1881] 7 A C 96

as already pointed out it can theoretically possess On page 10, the learned CHIEF JUSTICE proceeded

> It is a fundamental assumption that the legislative powers of the Centre and Provinces could not have been intended to be in conflict with one another A general power ought not to be so construed as to make a nullity of a particular power conferred by the same Act and operating in the same field when by reading the former in a more restricted sense effect can be given to the latter in its ordinary and natural meaning

SULAIMAN J stated on page 21

> A condition may arise from the fact that some heads overlap as the groupings cannot be absolutely perfect When overlapping is unavoidable the provisions of section 100 operate (referring to section 100 of Government of India Act corresponding to Article 246 of the Constitution)

In *Bhola Prasad* v *E* (1) the Federal Court upheld the validity of the Bihar Excise (Amendment) Act of 1940 passed by a provincial legislature By that Act possession of intoxicating liquor by any person subject to certain exceptions was prohibited It was held that a power to legislate with respect to intoxicating liquors and narcotic drugs that is to say the production, manufacture possession transport purchase and sale of intoxicating liquors opium and other narcotic drugs entry no 31 of the Provincial List included the power to prohibit intoxicating liquors throughout the province GWYER, C J remarked on page 19 that

> A power to legislate with respect to intoxicating liquors could not well be expressed in wider terms The words that is to say, the production other narcotic drugs were held to be explanatory

(1) A I R 1942 F C 17

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or illustrative words and not words either of amplification or of limitation It was said to be difficult to conceive a legislation with respect to intoxicating liquors and narcotic drugs which did not deal in some way or other with their production manufacture, etc and those words were said to be apt to cover the whole field of possible legislation on the subject Nicholas writes in his Australian Constitution p 241, that the words with respect to indicate the complete nature of a legislative power

The Madras General Sales Tax Act of 1939 passed by Provincial Legislature was held to be valid in *The Governor General in Council v The Province of Madras* (1) The Act purported to levy a tax on first sales in Madras of goods manufactured or produced in India It was held to come within entry no 48 of the Provincial List taxes on the sale of goods and not within entry no 45 of the Federal List duties of excise on tobacco and other goods manufactured or produced in India Lord SIMONDS observed on page 388

> It is right first to consider whether a fair reconciliation cannot be effected by giving to the language of the Federal Legislative List a meaning which, if less wide than it might in another context bear is yet one that can properly be given to it and equally giving to the language of the Provincial Legislative List a meaning which it can properly bear

The Act that was considered in *Miss Kishori Shetty v The King* (2) was the Bombay Abkari Act which prohibited without permit or licence possession of any intoxicant or hemp in excess of a certain quantity The Federal Court held that the Act was validly passed by the State Legislature because it was

(1) (1945) 47 C W N 381 (2) A I R 1950 F C 69

with respect to intoxicating liquor and narcotic drugs entry no 31 of the Provincial List It was stated by PATANJALI SASTRI, J (as he then was) that the power given under entry no 31 was expressed in wide and unqualified terms and it was far fetched to suggest that so far as the provision in the Bombay Abkari Act covered foreign liquors it was legislation with respect to import and export across customs frontiers mentioned in entry no 19 of the Federal List In the *State of Bombay* v *F N Balsara* (1) FAZL ALI, J laid down on page 422 that

> Where there is a seeming conflict between an entry in List II and an entry in List I an attempt should be made to see whether the two entries can not be reconciled so as to avoid a conflict of jurisdiction

and relied upon the cases of the *Central Provinces and Berar Act* (2) and *Governor General in Council* v *The Province of Madras* (3)

The pith and substance doctrine has been laid down in a number of decisions In *Governor General in Council* v *The Province of Madras* (3) Lord SIMONDS held on page 382 that when a conflict arises between two lists it is not the name of the tax but its real nature, its pith and substance as it has sometimes been said which must determine into what category it falls In *Kishori Shetty's* case (4) PATANJALI SASTRI J said on page 75

> It an enactment according to its true nature its pith and substance clearly falls within one of the matters assigned to the Provincial Legislature, it is valid notwithstanding its incidental encroachment on a Federal subject

(1) A I R 1951 S C 318 (2) A I R 1939 F C 1
(3) (1945) 40 C W N 380 (4) A I R 1950 F C 69

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FAZL ALI J observed in the case of *Balsara* (1) at page 522 that

> It is well established that the validity of an Act is not affected if it incidentally trenches on matters outside the authorized field and therefore it is necessary to inquire in each case what is the pith and substance of the Act

The pith and substance or the true nature and character of an Act is ascertained for the purpose of determining whether it is with respect to matters in this list or that list (*ibid*, p 522) In *Attorney General for Ontario* v *The Attorney General for Canada* (2) the Judicial Committee laid down that

> When the text is ambiguous as for example when the words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either recourse must be had to the context and scheme of the Act

This observation was relied upon by GWYER, C J in the case of the *Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act* (3)

Judging the matter in the light of the principles laid down above I have no doubt that the Amendment Act is a legislation with respect to persons entitled to practise before the High Courts entry no 78 of List I The principal Act and the Amendment Act both are legislations with respect to Advocates who are persons entitled to practise before High Courts The Amendment Act comes within entry 26 of List III but the real question when there is said to be a conflict between List I and List III is whether the legislation comes within List I or not If it comes within List I Parliament has the exclusive power even though it may come within List III as well The provision in entry no 78

(1) A I R 1951 S C 318
(2) A I R 1930 F C 1
(2) L R [1912] A C 571

of List I is by way of an exception to entry no 26 of List III The power conferred by entry no 26 of List III is general but since there is a power conferred by entry no 78 of List I with respect to persons entitled to practise before the High Courts the general power must be read subject to that power and a legislation with respect to Advocates must be held to come within entry no 78 of List I regardless of whether it comes within entry no 26 of List III or not The Bar Councils Act dealt only with Advocates who are the persons entitled to practise before the High Courts The Amendment Act applied the whole Act with some modifications to the new High Court All persons claiming a right to practise before the new High Court are governed by the Amendment Act But for the Amendment Act they would not have been governed by the principal Act because it applied to the old High Court which was in existence when it came into force and could not apply to the new High Court established subsequently [unless the State Government issued a notification under section 1(2)] Had the Amendment Act not been passed the persons claiming a right to practise before the new High Court would not have been governed by the principal Act It does not matter how the Amendment Act has made the principal Act applicable to them It does not matter if all the provisions of the principal Act, which are made applicable to them have not been reproduced word by word in the Amendment Act It does not matter if it has achieved its object simply by substituting the words High Court of Judicature at Allahabad constituted by the U P High Court Amalgamation Order in place of the word Allahabad in section 1(2) of the principal Act The object of the Amendment Act was to apply the principal Act with some modifications to the persons claiming a right to practise before the Court

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THE SUPREME COURT OF ALLAHABAD

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Thus the pith and substance or the true nature and character of the Amendment Act is making a law regarding the rights and liabilities of persons entitled to practise before High Courts The words with respect to persons entitled, etc are wide enough to cover all legislation with respect to such persons Legislation which applies to all persons including persons entitled to practise before High Courts may not be said to be legislation with respect to persons entitled to practise before High Courts but legislation which is exclusively applicable to such persons as regards their rights and liabilities is undoubtedly with respect to them The Arms Act or the Motor Vehicles Act applies to all persons including such persons and therefore may not be said to be laws with respect to such persons If such persons are also governed by their provisions it is the incidental effect of them The laws were not enacted to deal with them They were enacted to deal with all persons and incidentally they became applicable to such persons also But the Bar Councils Act and the Amendment Act dealt exclusively with persons entitled to practise before High Courts The effect of the legislation felt by them was not an incidental effect They were primarily intended to be affected by the Acts I see no force in the contention of the learned Advocate-General that the entry no 78 only refers to qualifications required for practising before High Courts The words with respect to are wide enough to cover the whole field of legislation which primarily affects in any manner persons entitled to practise before High Courts

The learned Advocate General referred to Article 19(1) (g) and (6) All citizens have the right to practise any profession or to carry on any occupation But this does not mean that the State cannot make any law relating to the professional qualifications necessary for practising any profession or carrying on any occupation

In List I there is entry no 66 Union agencies and institutions for (a) professional vocational or technical training The learned Advocate General contended on the basis of this provision that laws regarding qualifications only were contemplated to be on an all India basis and nothing else The words used in entry no 78 are not qualifications of persons entitled to practise before High Courts Merely because Parliament has the right to make laws with respect to Union agencies and institutions for professional vocational or technical training it cannot be said that Parliament has the right to make laws under entry no 78 only regarding qualifications of persons entitled to practise before the High Courts I see no connexion between entries nos 65 and 78 and do not think that any light on the interpretation of entry no 78 is shed by entry no 65 or Article 19(6) Article 19(6) deals only with the question whether a certain law can be made or not and not with the question by whom it can be made

The words with respect to persons entitled to practise before the High Courts do not mean merely the question who shall be entitled to practise before the High Courts They must not be mistaken for the words right to practise before the High Courts The Amendment Act as a matter of fact deals with the right of practice before the High Court and also the qualifications required by a person claiming the right Under section 8 of the principal Act made applicable to the new High Court under the Amendment Act no person is entitled as of right to practise in the High Court unless his name is entered in the roll of the Advocates maintained under the Act Section 9 of the principal Act empowers Bar Councils to make rules to regulate the admission of persons to be Advocates of the High Court by prescribing qualifications to be possessed by

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Desai J.

tlement and in other ways Section 10 deals with the loss of the right to practise before the High Courts

It was conceded by the learned Advocate General that the whole of the principal Act could not be enacted by the State Legislature He said that some provisions of it could be enacted by it not others including section 8 But he contended that the State Legislature has merely applied the provisions of the principal Act to the new High Court and has not enacted those provisions On the analogy of executive authorities extending the applicability of Acts made by legislatures beyond the areas or the tenures fixed by the legislatures, he argued that the State Legislature has not made a law with respect to persons entitled to practise before the High Courts even though the effect of it is to make them governed by the principal Act with modifications The contention is unsound There is absolutely no analogy between what has been done in the present instance by the State Legislature and what is done by executive authorities in exercise of powers specifically conferred upon them by enactments If a legislature passes an enactment making it initially applicable in a particular area or for a particular period and empowering executive authorities to extend it to other areas or beyond the period initially fixed and the executive authorities issue an order extending its applicability to other areas or beyond the period originally fixed it may not be said that the Legislature has not made a law with respect to the other areas or for the extended period and it may not be said that it is the executive authorities who have made a law with respect to the other areas or for the extended period But when a legislature itself expressly and after going through all the legislative formalities enacts law even though it may be in the form of adopting some law passed by some other legislature for some other area it is impossible to say

that it has not made a law In the former case the appropriate legislature has made a law which may be applied to other areas or beyond the period originally fixed by it and has left it to the executive authorities to determine those areas or the duration of the extended period in the other case no such law has been made by the legislature enacting the adopted law No authority was shown to us in which it might have been held that even when an enactment is made with due legislative formalities by a legislature it has not made a law In the present instance the principal Act did not empower the State Legislature to apply its provisions to other High Courts by simply passing a resolution The State Legislature did not pass the Amendment Act in exercise of any power conferred upon it under the principal Act Therefore neither can it be urged that the legislature enacting the principal Act has conferred any power upon the State Legislatures nor can it be urged that the State Legislature by passing the Amendment Act has not made a law but simply exercised a power conferred upon it When executive authorities extend the applicability of an Act in pursuance of a power conferred by the Act the whole law is deemed to have been laid down by the legislature passing the Act and the executive authorities are simply deemed to have exercised the power and not made a law But when a State legislature makes an enactment not purporting to do so in exercise of any power conferred upon it by another enactment and expressly in exercise of its law making power it cannot be said with any show of reason that it has done an executive act and not a legislative act Merely because the doing of an act by the executive authorities is held in certain circumstances to be an executive and not a legislative act it cannot be said that whenever that act is done by a legislature it is not a legislative act

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Desai J.

The next contention of the learned Advocate General was if I have understood him correctly that making a law adopting some law previously made by another legislature even with modifications is not making a law with respect to the matters dealt with in the previous law. Every law that is made by a legislature in order to be effective must be within its powers. What laws are within the powers of which legislatures is exhaustively laid down in Article 246 of the Constitution. A State legislature has power to make laws with respect to only those matters that are exhaustively enumerated in Lists II and III and has no power whatsoever to make laws with respect to any matter that cannot be found in them. A State legislature has no residuary powers at all. Adopting a law made by another legislature is not a matter to be found in Lists II and III. Therefore no law made by a State legislature can be justified on the ground that though it is not with respect to any of the matters dealt with in Lists II and III it is simply adopting a law validly made by another legislature. As has been laid down one must have regard to the substance and not to the form of the enactment. Even though the form may be that of adopting a law made by another legislature in substance it is a law with respect to the matters dealt with in the adopted law. If a State legislature has no power to make a law with respect to those matters it has no power to adopt that law. If a legislature cannot do anything directly it cannot do it indirectly. If a State legislature cannot directly enact a law with respect to a certain matter it cannot do so indirectly by simply adopting a law made with respect to it by another legislature.

In the present case the State Legislature has not merely adopted a law made by another legislature, it has made substantial modifications in it. Thus the

case is worse than that of adopting a law made by another legislature When executive authorities are empowered to extend an Act beyond a certain area or a certain period with such modifications as they may think fit, and they extend it with modifications even then the act is held to be an executive act and not a legislative act But that is because the modifications are presumed to have been within the framework of the Act In re *The Delhi Laws Act* 1912 (1) FAZL ALI J, said on page 846

> The modifications are to be made within the framework of the Act and they cannot be such as to affect its identity or structure or the essential purpose to be served by it

In his view the power of introducing necessary restrictions and modifications is incidental to the power to apply or adapt the law The modifications effected by the State Legislature in the Amendment Act however stand on a different footing The State Legislature was bound by no rule to make only such modifications as were within the framework of the principal Act Besides the discretion given to modify an Act is said to be by no means absolute or irrevocable in the strict legal sense The Legislature is always in a position to see how the powers which it has conferred are being exercised, and if they are exercised injudiciously or otherwise than in conformity with its intention or they result in any inconvenience it can always by another Act recall its powers [See *E v Bimah* (2) and in re *The Delhi Laws Act* (1) The State Legislature when it enacted the Amendment Act was under no such check by the Union Legislature that had passed the principal Act Therefore it is not possible to apply the doctrine of such decisions as in re *The Delhi Laws Act* in the present case and hold that the State Legislature has not made a law by passing the Amendment

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DIXIT J.

(1) (1951) 2 S C R 747 (2) (1950) 7 I L R 9 Cal 68 140

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Desai J.

Act. When it was not empowered by any other legislature to pass it it could not possibly have passed it but in exercise of the legislative powers conferred by Article 246 it could not claim to have passed it in exercise of powers conferred by any enactment.

I hold the Amendment Act to be *ultra vires* the U. P. State Legislature.

The Amalgamation Order clause 17(c) lays down that references in any Indian Law to either of the existing High Courts by whatever name shall unless the context otherwise requires be construed as references to the new High Court. So it was contended on behalf of the opposite parties that the reference to the High Court of Judicature at Allahabad in section 1(2) of the principal Act would be construed as reference to the new High Court that consequently the principal Act would apply to the new High Court and that even if the Amendment Act were declared to be *ultra vires* the State Legislature it would make no difference and the applicant would be bound to pay the fee if he wanted himself to be enrolled as an Advocate. The Amalgamation Order is to have effect subject to any provision that may be made on or after the appointed day with respect to the new High Court by any legislature or authority having power to make such provision (see clause 18). As the Amendment Act has been held to be *ultra vires* and as no other provision has been made by any legislature or authority having power to make such provision the Amalgamation Order remains in force. It follows that section 1(2) of the principal Act refers to the new High Court. But that seems to me to be the only effect, it has not the effect to conferring a power upon the new High Court to do fresh everything that the old High Court was empowered to do. Wherever the words "The High Court of Judica

ture at Allahabad are used in the Act they may be interpreted to refer to the new High Court but it is quite a different thing to say that whatever the old High Court was required to do has to be done over again by the new High Court as the result of this interpretation and clause 17(c) The provisions of the Act which require the High Courts to which it applies to do certain acts use the words High Court and not The High Court of Judicature at Allahabad There fore those provisions are not affected at all by clause 17(c) and there arises no question of the new High Court s doing again or afresh what the old High Court was required to do The clause simply interprets the words The High Court of Judicature at Allahabad and does not confer any powers upon the new High Court There existed the Bar Councils at Allahabad and at Lucknow and so long as they were not dissolved, another Bar Council could not be created The principal Act did not contain any provision for dissolution of a Bar Council There cannot possibly be two Bar Councils for the same High Court under the Act Therefore even if it could be said that the clause empowered the new High Court to do over again all the acts that were to be done by the old High Court the context requires that a new Bar Council cannot be created so long as the old Bar Councils exist The proviso to clause 8(2) of the Amalgamation Order lays down that

> any person who immediately before the appointed day is an Advocate entitled to practise in either of the existing High Courts shall be recognized as an Advocate entitled to practise in the new High Court

Thus the Amalgamation Order itself preserved to all the Advocates the right to practise in the new High Court Consistently with that provision it cannot be said that the right to practise in the new High Court

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JAGDISH SARAN SHARMA v. THE SECRETARY, COUNCIL OF LUCKNOW

depends upon fresh enrolment by a new Bar Council. The applicant had the right to practise in the old High Court on the appointed day and the proviso to clause 8(2) continued that right. Clause 17(c) must be read in such a manner as to continue that right. In other words, it does not contemplate the creation of a new Bar Council and preparation of a new roll of Advocates of the new High Court. If a new roll is not to be prepared there arises no question of payment of any fee. If the applicant's right to practise in the new High Court continued by the proviso to clause 8(2) it cannot be made dependent upon his paying any fee. In the result I find that the Amalgamation Order does not authorize the preparation of a new roll of Advocates and the demand of a fee from those wishing to practise in the new High Court.

The applications must be granted and a writ of *mandamus* should be issued to the opposite parties 1 and 2 directing them to include or retain the name of the applicant in the roll of Advocates without his having to pay any sum of money. As the main dispute in the case was about the constitutionality of the U. P. Amendment Act and as it has been decided against opposite party no. 3, I think the applicant should get his costs of these proceedings from it.

MUKERJI, J.—I agree.

BY THE COURT—We allow the application and direct a writ of *mandamus* to be issued to the opposite parties nos. 1 and 2 directing them not to demand any fee from the applicant for retaining his name in the roll of Advocates or, if a new roll is being prepared, for including his name in it. The main dispute in the case was about the constitutionality of the U. P. Amendment Act and as it has been decided against opposite party no. 3, we direct that the applicant will get his costs of these proceedings from opposite party no. 3.

Order accordingly.

CRIMINAL REVISION

Before Mr Justice Beg

GIRJA NATH

v

STATE

1953
October 23

Essential Supplies (Temporary Powers) Act, 1946 *s* 7(2)—*Ingredients of offence under it—It eliminates consideration of* mens rea *and other general exceptions*

The ingredient of an offence under s 7(2) of the Essential Supplies Act does not eliminate a consideration of *mens rea* and other general exceptions though the burden of proving them is on an accused

Case law discussed

Criminal Revision no 76 of 1952 from an order of L P Nigam Additional Sessions Judge II of Etawah dated the 12th November 1951

The facts appear in the judgment

G S Sloan, for the applicant

Hira Lal Capoor (for the Assistant Government Advocate) for the State

BEG J —The applicant Girja Nath has been convicted under section 7(2) (*a*) of the Essential Supplies Act for contravention of the terms of licence B issued under the U P Foodgrains Control Order 1948 Under section 7(2) (*a*) of the Essential Supplies Act he has been ordered by the lower court to pay a fine of Rs 500 and under section 7(2) (*b*) of the same Act the entire grain, in respect of which he is alleged to have contravened the provisions of the U P Foodgrains Control Order 1948 has been ordered to be forfeited to the Government

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GIRJA NATH v. STATE

Bag J

The applicant is the proprietor of a firm styled as Messrs Kalika Prasad Girja Nath at Auraiya It appears that the firm was carrying on business in grains On the 8th of November 1950 there was a raid of this firm by Sri Sukhbir Singh S O Auraiya, under the orders of Sri J N Gupta S D M Auraiya During this raid it was discovered that 19 bags of Bajra weighing 48 maunds 22 seers and 12 chhataks were found in the stock It was also found that there was no entry of the Bajra in the Stock Register Ex P 4 Sri Sukhbir Singh (P W 2) prepared the recovery list Ex P 5 and made a report Ex P 1 to Sri J N Gupta (P W 1) who examined Girja Nath accused under section 164, Cr P C immediately and recorded his statement which is Ex P 2 The statement of Girja Nath given at the time would show that his defence was that the Bajra in question was purchased on the 5th of November, 1950 and that he left for Kanpur on the same day and therefore the entry could not be made on that He was out of station and did not return till the 8th of November 1950 when the raid was made

In support of his defence the accused Girja Nath examined a number of witnesses to prove that he had left for Kanpur on the 5th of November 1950 that he returned from Kanpur on the 8th November 1950 and that the Bajra in question was purchased by him on the 5th of November 1950

Both the lower courts have believed the defence evidence and have held in favour of the accused that the Bajra in question was purchased on the 5th of November 1950 that as alleged by the accused he had left for Kanpur on the 5th of November 1950 and that he did not return from there till the 8th of November 1950

The trial court had convicted the accused under section 7(a) of the Essential Supplies Act and sentenced

him to six months rigorous imprisonment and to a fine of Rs 2 000 or in default to undergo further six months rigorous imprisonment It had further ordered the forfeiture of the Bajra or its sale proceeds

The appellate court maintained the conviction of the applicant but reduced the sentence as mentioned above as it was of opinion that there were extenuating circumstances in the case These extenuating circumstances were summarized by the appellate court in the following words

> I have already noted above that it is proved that the appellant left for Kanpur the very day of the disputed purchase and returned on the very date of the raid These facts clearly provide an extenuating circumstance There is also a fair possibility of there being accidental omission or in other words of the absence of any criminal intention Taking into consideration these facts I think the sentence imposed on him by the trial court is rather barbarous

In view of the aforesaid finding which was treated by him as an extenuating feature in the case the lower court reduced the sentence

Girja Nath has filed this revision in the High Court against the said judgment and the learned counsel appearing on behalf of the applicant has not contested any of the findings arrived at by both the courts below On the other hand he has placed full reliance on the findings of fact arrived at by both the courts He has strongly relied on the finding given by the lower appellate court to the effect that there is a fair possibility that the non compliance with the requirements in the present case was the result of an accidental mistake or omission or in other words of the absence of criminal intention He has argued that this is not merely an

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extenuating circumstance but a factor that would absolve the applicant from criminal liability altogether. The finding of the lower appellate court in this regard is supported by the circumstances of the case. It is in evidence that prior to the raid the applicant brought out his Bahi and himself pointed out the mistake in the register. He showed the entry in his private Bahi recording the receipt of the Bajra in question and stated that the omission to enter it in the Stock Register was due to his going away to Kanpur on that day. It appears that the entry in the Bahi used to be made as and when the grain was received, but entry in the Stock Register used to be made at the close of the day. As according to the applicant he left for Kanpur on the very day the entry could not be made on the 5th of November 1950. The applicant returned on the 8th of November 1950 and the register does contain an entry in the remarks column of that date to the effect that 48 maunds and some seers of grain were by inadvertence omitted from being entered on the 5th of November 1950 and hence the entry respecting it was being made on the 8th of November 1950. Further the applicant produced evidence to prove that the Bajra was received by the firm on the 5th of November 1950 and that on that very day he left for Kanpur. He produced a number of witnesses to prove this fact and this evidence has been considered to be quite reliable by both the courts. Thus there is ample material to support the finding of the lower court and the finding cannot therefore be characterised as unreasonable or perverse.

The question as to how far accidental mistake or absence of *mens rea* can exempt an accused from liability in a case like this has been the subject matter of serious contest at this stage. After hearing the parties at length, I have however come to the conclusion that in view of the circumstances brought out

in the present case and above all, in view of the finding given by the lower appellate court the applicant should be acquitted Generally *mens rea* is considered as an essential ingredient of a criminal offence In some cases the statute expressly mentions the particular kind of *mens rea* by using words like intention knowledge or belief in the definition of the offence itself In other cases, it is not mentioned in the statute at all The fact that the statute is silent on the point does not however mean that it intended to eliminate the ingredient of *mens rea* from the definition of the offence *Mens rea* is implied in every offence except where it is expressly excluded by the statute itself or where the offences themselves belong to that limited group of offences which do not call for consideration of *mens rea* The idea underlying the doctrine of *mens rea* is embodied in the maxim '*actus non facit reum nisi mens sit rea* according to which the intent and the act must both concur to constitute a crime

In law crime consists of two elements—*actus reus* and *mens rea* *Actus reus* represents the physical aspect of crime and *mens rea* represents its mental aspect If the former can be called its body then the latter may be termed as its spirit *Actus reus* has been defined as such result of human conduct as the law seeks to prevent *Mens rea* is a loose term of elastic signification and covers a wide range of mental states and conditions, the existence of which would give a criminal hue to *actus reus* Sometimes it is used to refer to a foresight of the consequences of the act and at other times to the act *per se* irrespective of its consequences In some cases it stands for a criminal intention of the deepest dye such as is visible in a designed and premeditated murder committed with a full foresight of its fatal consequences In other cases

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it connotes mental conditions of a weaker shade such as are indicated by words like knowledge belief, criminal negligence or even rashness in disregard of consequences At other times it is used to indicate a colourless consciousness of the act itself irrespective of the consequences of the act or in other words a bare capacity to know what one is doing as contrasted for example with a condition of insanity or intoxication in which a man is unable to know the nature of the act

There might be *actus reus* without *mens rea* Thus for example if an infant of two years while playing with a loaded pistol lets it go and kills another person there is *actus reus* without *mens rea* There might also be *mens rea* without *actus reus* As an illustration of it Kenny in his book on Outlines of Criminal Law cites the story of Garrick on whose declaring that whenever he acted like Richard III he felt like a murderer, Dr Johnson retorted Then he ought to be hanged every time he acts it In ethics or religion an evil deed may be committed in mind and might constitute a wrong even though it has not manifested itself in physical conduct In primitive societies the emphasis on the physical aspect is so great that even inanimate things and animals sometimes become objects of criminal punishment for setting into motion a chain of events that result in an injury In such a state mere *actus reus* might be enough to create criminal liability As society advances the mental element is imported into *actus reus*, and the conception of crime is interwoven with morality Mere *actus reus* ceases to be criminal because in so far as it lacks *mens rea*, it ceases to be the act of the individual and is put more or less on a par with accident or an act of nature In this manner law has effected a harmony between the physical and the moral aspect of wrong by combining both within the juristic concept of crime

This transformation, however, is not achieved at one stroke, but is a result of slow and gradual development The course of evolution provides instances of conflicting rulings depending on the various degrees of resistance offered by different Judges to the importation of *mens rea* into *actus reus* and on the varying emphasis placed by them on the one or the other The two leading English cases on the subject are those of *Reg* v *Prince* (1) and *Queen* v *Tolson* (2) In the former the emphasis was on *actus reus* and in the latter on *mens rea* In the case of *Reg* v *Prince* the accused was indicted under a statute making it an offence to take an unmarried girl under the age of 16 out of the possession and against the will of another person having lawful charge of such girl It was held that the mere fact that the accused honestly believed the girl to be over 16 or that she appeared to be or represented herself to be above the age of 16 was no defence In this case the penal statute was strictly construed

On the other hand a liberal view of the interpretation of the penal statute was taken in *Queen* v *Tolson* (2) in which a woman was indicted of bigamy It was held a good defence on her part that at the time of entering into marital tie she honestly believed on reasonable grounds that her husband was dead

WILL J observed as follows

> '*Prima facie*, the statute was satisfied when the case was brought within its terms and it then lay upon the defendant to prove that the violation of the law which had taken place had been committed accidentally or innocently so far as he was concerned (175)

In another part of the same judgment WILL J made the following significant observations

> At common law an honest and reasonable belief in the existence of circumstances which, if true

(1) L R [1875] 2 C C R 154 (2) L R [1889] 23 Q B 168

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would make the act for which a prisoner is indicted an innocent act has always been held to be good defence The doctrine is embodied in the somewhat uncouth maxim *actus non facit reum nisi mens sit rea* Honest and reasonable mistake stands in fact on the same footing as absence of the reasoning faculty as in infancy or perversion of that faculty, as in lunacy (181)

In this judgment he also made a reference to the leading case of *Reg* v *Prince* (1) often cited in support of the opposing view and observed that in that case it was not suggested by any of the Judges that the exception of honest and reasonable mistake was not applicable to all offences whether existing at common law or created by statute

In the same case STEPHEN, J laid down the principles in the following words

> The full definition of every crime contains expressly or by implication a proposition as to a state of mind Therefore if the mental element of any conduct alleged to be a crime is proved to have been absent in any given case the crime so defined is not committed
>
> In all cases whatever competent age sanity and some degree of freedom from some kinds of coercion are assumed to be essential to criminality, but I do not believe they are ever introduced into any statute by which any particular crime is defined (187)

He further went on to observe that—

> In every case knowledge of fact is to some extent an element of criminality as much as competent age and sanity To take an extreme illustration can any one doubt that a man who though

(1) L R [1875] 2 C C R 154

> he might be perfectly sane committed what would otherwise be a crime in a state of somnambulism would be entitled to be acquitted? And why is this? Simply because he would not know what he was doing (187)

The apparent conflict between *Reg* v *Prince* (1) and *Queen* v *Tolson* (2) is however capable of being resolved if it is remembered that the act which was the gravamen of offence in *Reg* v *Prince* (1) was intrinsically wrong This would satisfy the requirement of *mens rea* for the intention need not be to commit a criminal wrong So long as the act is wrong in itself the person committing it takes the risk and does it at its own peril

The next case which may be usefully referred to in this connexion is that of *Sherras* v *De Rutzen* (3) In this case the word knowingly which initially found a place in the statute was omitted from it and from this fact it was argued that the intention of the statute was to eliminate *mens rea* from consideration Dealing with this point DAY, J observed as follows

> An argument has been based on the appearance of the word knowingly in sub section 1 of section 16 and its omission in sub section 2 In my opinion the only effect of this is to shift the burden of proof In cases under sub section 1 it is for the prosecution to prove the knowledge while in cases under sub section 2 the defendant has to prove that he did not know That is the only inference I draw from the insertion of the word knowingly in the one sub section and its omission in the other (921)

(1) L R [1875] 2 C C R 154 (2) L R [1889] 23 Q B 168
(3) L R [1895] 1 Q B 918

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The following remarks from the judgment of WRIGHT, J. in the same case are also relevant

> There is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act is an essential ingredient in every offence but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject matter with which it deals and both must be considered [*Nichols* v *Hall* (1)] (921)"

Dealing with the question as to how far the statute can abrogate the principles of common law in this regard Russel at page 39 of his well known Treaties on Crimes (Vol I 1950 Edition) has expounded the law in the following words

> Ancient doubts as to the power of the Legislature to abrogate the rules of the common law have long since been eliminated and the modern doctrine of the absolute and literal authority of statute is firmly and beyond all question established in the law of England Nonetheless it is an undoubted rule that statutes should be construed so as to accord with the accepted rules of the common law rather than to conflict with them

It is a sound rule to construe a statute in conformity with the common law rather than against it except where and so far as the statute is plainly intended to alter the course of the common law

On this principle of construction, there is a presumption that in any statutory crime the ordinary mental element *mens rea*, is an essential ingredient

In the Indian Penal Code there is a recognition of this principle in various forms in Chapter IV which enumerates a number of general exceptions to all offences

(1) L R 8 C P 322

According to section 76 I P C

> Nothing is an offence which is done by a person who is or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be bound by law to do it

Section 79 I P C lays down

> Nothing is an offence which is done by any person who is justified by law or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be justified by law in doing it

Section 80 I P C states that—

> Nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution

Section 81 I P C recognizes the exception in favour of an act likely to cause harm but done without criminal intention and in order to prevent other harm

Section 82 I P C, exempts a child under seven years of age from all criminal liability

Section 83 I P C exempts from criminal liability a child above seven years of age and under twelve who has not attained sufficient maturity of understanding to be able to realize the full implications of his conduct Section 84 I P C contains a similar exception in favour of a person of unsound mind

Sections 85 and 86 I P C lay down conditions under which an intoxicated person can be exempted from criminal liability

The above sections are cited as illustrations to show that the Indian Law has recognized the principle underlying *mens rea* in various forms and ways and given

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effect to it Under section 40 I P C, the exceptions enumerated in Chapter IV would apply not only to offences punishable under the Indian Penal Code but also to offence punishable under any statute or local law Under section 41 I P C a special law is defined as a law applicable to particular subject Under section 42 I P C a local law is a law applicable only to a particular part of the territories comprised in India Under section 32 I P C except where a contrary intention appears words referring to acts cover illegal omissions There is therefore no doubt that these exceptions would be applicable to offences committed under the Essential Supplies Act read with U P Foodgrains Control Order 1948

The above enunciation of law does not however, mean that there cannot be any offence without *mens rea* There are and there can be offences even without *mens rea* The statute itself might be so framed as to indicate that *mens rea* was not to be considered as an element of a particular offence or the subject matter of the statute and its aims and object might necessarily exclude the application of *mens rea* Further there are quasi criminal offences in which the question of *mens rea* might not arise or there might be offences in which compelling considerations of public justice might require its exclusion e g certain offences relating to adulteration of food or drugs Again for example there might be petty offences punishable with fine such as a contravention of some municipal bye laws in which *mens rea* might not play a part at all The number of such exceptions however is a strictly limited one and the courts will not extend the ambit of such exceptions unless it is clearly warranted either by words of the statute or by the circumstances of a constraining nature flowing from imperative consideration of public justice

No doubt in the present case the statute has not laid down any *mens rea* On the other hand the provisions of the statute are mandatory According to condition no 1 of Form B of the license the licensee is required to maintain a register showing correctly (*a*) the opening balance on each day (*b*) the quantities received by him on each day (*c*) the quantities disposed of by him each day and (*d*) the closing balance at the end of each day The position therefore, is that the statute has not specified any *mens rea* as a part of the offence At the same time the statute has not excluded *mens rea* or other kindred exceptions which constitute its satellites Under the circumstances the ordinary presumption of the applicability of *mens rea* must prevail To my mind the effect of the omission of any mention of *mens rea* is merely to lead to an initial presumption of its existence and to shift the burden of proof on the accused to prove that he comes within any of specified or well recognized exceptions

Further, there is nothing in the subject matter of the Act or its aims or objects to warrant its exclusion by necessary implication On the other hand there are a number of considerations pointing in the opposite direction and inviting the importation of the cardinal principle of *mens rea* in the adjudication of an offence contemplated by section 7 of the Essential Supplies Act the most important of them being the heavy nature of the penalty provided An offence under section 7(2) of the Essential Supplies Act does not appear to be a petty one at all Section 7(2) deals with offences which are not punishable with fine only An offence under section 7(2) of the Essential Supplies Act is punishable with imprisonment for a term which may extend to three years and the offender is also liable to fine in addition to the forfeiture of the property to the Government In certain cases an offence under section 7(2)

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of the Essential Supplies Act is even punishable with imprisonment which may extend to seven years with further liability to pay a fine not less than twenty times the value of foodgrains recovered as well as forfeiture of the entire amount of the foodgrain It is therefore obvious that the statute provides a substantial punishment for the commission of such offences It would be revolting to human conscience to imagine that a person could be punished with such severe sentences extending to several years of rigorous imprisonment and be branded for ever as an ex convict merely because he failed to comply with the letter of the statute even though he was morally and mentally innocent The consequences of taking this view might be monstrous in certain cases Supposing for example a man, who was in charge of the firm and whose duty it was to prepare the said register, suddenly got a stroke of paralysis in the day with the result that the register was left incomplete in the evening Supposing again that there was an earthquake and the shop had to be closed for that reason and the required entries could not be made Or supposing by accident the register caught fire and was destroyed, or by accident ink was spilled on a particular page of the register spoiling and defacing the entries that were made on it A multitude of instances easily present themselves to the mind In all these cases there can be no doubt that there has been an obvious failure to comply with the letter of the law Can it however be said that in such cases the statute intended the person responsible to be the recipient of severe penalties which the law prescribed for the delinquent Such dire punishment seems to be reserved for those who have transgressed mentally and morally as well and not for those who happen to be the unfortunate victims of accidents or circumstances beyond their control or who have unwil

or misapprehension An interpretation of the penal provision in the light of the principle of *mens rea* seems to be the only way of avoiding such preposterous consequences and preventing the law from becoming a handmaid to oppression and injustice Under the circumstances I am not prepared to eliminate a consideration of *mens rea* and other exceptions from the ingredient of this offence Of course the burden of proving them would be on the accused and he must discharge the burden to the full satisfaction of the court concerned

So far as the cases in India are concerned this principle was recognized in the well known case of *Srinivas Mall Baroliya* v *Emperor* (1) in which their Lordships of the Privy Council quoted with approval the following remarks of the Lord Chief Justice of England

> It is in my opinion of the utmost importance for the protection of the liberty of the subject that the court should always bear in mind that unless the statute either clearly or by necessary implication rule out *mens rea* as a constituent part of a crime a defendant should not be found guilty of an offence against the criminal law unless he has got a guilty mind
>
> (1946 110 J P 3172 at page 318 (139)

The same principle was applied by a Bench of the Bombay High Court to an offence under sections 7 and 8 of the Essential Supplies (Temporary Powers) Act (XXIV of 1946) in *Isak Soloman Macmull* v *Emperor* (2) The judgment of CHAGLA, C J on this particular point provides an illuminating commentary on this subject

Applying the above principle to the present case and keeping in view the finding arrived at by the trial

(1) I L R [1947] Pat 460 (P C) (2) I L R [1948] Bom 299

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court I am of opinion that the applicant would be entitled to acquittal The finding regarding the possibility of omission being an accidental one of the absence of *mens rea* has been already given by the lower appellate court This finding as already observed is neither perverse nor unreasonable The applicant has therefore succeeded in discharging the burden that lay upon him On this finding in my opinion the applicant would be entitled to a complete acquittal

I accordingly set aside the conviction and sentence of the applicant and acquit him of the offence with which he was charged The fine if paid shall be refunded The Bajra forfeited by the Government or its sale proceeds should be delivered to the applicant

Order accordingly

CRIMINAL MISCELLANEOUS

Before Mr Justice Mootham and Mr Justice Sapru

PREM DUTT PALIWAL

v

SUPERINTENDENT CENTRAL PRISON AGRA AND ANOTHER

1953
October 29

Preventive Detention Act, 1950 *s 8—Constitution of India Art 22(4) (a)—Opinion of Advisory Board—Whether can oust the jurisdiction of High Court to determine validity of grounds of detention*

The opinion of an Advisory Board either under s 8 of the Preventive Detention Act or cl (4) (a) of Art 22 of the Constitution does not operate to oust the jurisdiction of High Court to determine whether the grounds upon which a person was detained satisfied the requirements of law

Criminal Miscellaneous no 261 of 1953

The facts appear in the judment

S N Dwivedi for the applicant

The Deputy Government Advocate (*Sri Rama*) for the State

PREM DAT PALIWAL v. SUPERINTENDENT CENTRAL PRISON AGRA

MOOTHAM, J.—This is a petition under Article 226 of the Constitution for the issue of a writ in the nature of *habeas corpus*.

The petitioner was detained on the 7th May, 1953 under section 3 (1) (*a*) (ii) of the Preventive Detention Act 1950. On the 29th May he was furnished by the District Magistrate with the grounds of his detention. Subsequently the case of the petitioner was referred to the Advisory Board, constituted under section 8 of the Preventive Detention Act which came to the conclusion that there was a sufficient cause for the petitioner's detention. Thereafter the Governor by an order dated the 6th August 1953, passed under sub-section (1) of section 11 of the Act directed that the petitioner continue to be detained for a maximum period of twelve months from the date of his detention.

The petitioner contends that his detention is illegal as the grounds upon which he was detained were vague and indefinite and did not disclose sufficient particulars to enable him to make an effective representation to the authorities.

The learned Deputy Government Advocate submits that even if the petitioner's detention were originally illegal it ceased to be so when the Advisory Board gave it as its opinion that there was sufficient cause for his detention. The validity of that detention learned counsel argues cannot today be challenged in this Court.

Article 22 (4) (*a*) of the Constitution so far as it is material reads as follows:

> 22 (4) No law providing for preventive detention shall authorize the detention of a person for a longer period than three months unless—
>
> (*a*) An Advisory Board consisting of persons who are or have been or are qualified to be

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PREM DUTT PATWAL v. SUPERINTENDENT CENTRAL PRISON AGRA

Mushtaq J.

appointed as Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention

This Article lays down a restriction on any law providing for preventive detention Unless that law makes provision for the report by an Advisory Board constituted in the manner prescribed the consequence is that the law itself in so far as it purports to authorize detention beyond three months would be invalid Such a provision is to be found in section 8 of the Preventive Detention Act 1950 but neither that section nor clause (4) (a) of Article 22 constitutes the Advisory Board a court of law or imposes on it the duty of determining whether a person s detention is legal All that section 8 of the Act does is to constitute a body which as its name implies is a purely advisory body whose duty it is to advise the Government whether in its opinion there is sufficient cause for the continued detention of a particular person or persons Its opinion cannot therefore in my view operate to oust the jurisdiction of this Court to determine whether the grounds upon which the petitioner was detained satisfied the requirements of the law

On the twelve grounds of detention served upon the petitioner learned counsel has drawn our attention to grounds 6 12 and part of ground 7 which read as follows

> 6 That you have been planning designs with some two or three others for getting the houses of the mill owners (Messrs Ramdayal Chhitarmal) looted and for bringing them to humiliation and disrepute'
>
> 7 That you have also been threatening the labour class which has no joined hands with you to leave the mills and join with you

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Mootham J.

"12 That you have sponsored led and organized two illegal strikes in which offences involving breaches of peace and disturbances of public order occurred

The first question is whether these grounds are expressed in terms which are sufficiently clear and precise to enable the petitioner to make an adequate representation to the appropriate authorities In none of the grounds has any date or time been mentioned In the case of ground 12 in which it is alleged that the petitioner organized two illegal strikes not only is there no mention of the date but no particulars are given as to the place or places where the alleged strikes are said to have occurred nor of the persons against whom they are alleged to have been directed In my opinion these grounds and in particular ground 12 are in terms which are too vague to enable the petitioner to make an adequate representation The Deputy Government advocate has strongly urged before us that if the twelve grounds are read as a whole then the petitioner ought to have had no difficulty in understanding that it was which was made the subject matter of complaint in grounds 6 7 and 12 A similar argument was addressed to the Supreme Court in *Ram Krishan Bhardwaj* v *The State of Delhi* (1) but was rejected in these words

> Surely it is up to the detaining authority to make his meaning clear beyond doubt without leaving the person detained to be his own resource for interpreting the grounds

The second question is whether one or more vague grounds among others which are clear and definite would infringe the constitutional safeguard provided in Article 22 (5) of the Constitution This question is no longer open to argument It has been answered

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in the affirmative by the Supreme Court in *Ram Krishan Bhardwaj's* case to which I have just referred. The learned CHIEF JUSTICE delivering the judgment of the Court said:

> Preventive detention is a serious invasion of personal liberty and such meagre safeguards as the Constitution has provided against the improper exercise of the power must be jealously watched and enforced by the court. In this case the petitioner has the right under Article 22(5), as interpreted by this Court by a majority, to be furnished with particulars of the grounds of his detention sufficient to enable him to make a representation which on being considered may give relief to him. We are of opinion that this constitutional requirement must be satisfied with respect to each of the grounds communicated to the person detained, subject of course to a claim of privilege under clause (6) of Article 22.

In my opinion the petitioner's detention cannot be held to be in accordance with the procedure established by law and he is entitled to be released. I would direct that he be set at liberty forthwith.

SAPRU, J.—I agree with the order proposed to be passed by my brother MOOTHAM.

The facts which have given rise to this petition have been narrated by him and I think it is unnecessary for me to repeat them. A point which was made by the Deputy Government Advocate, Sri *Sri Rama* was that this petition was only presented to this Court on the 21st October, 1953, though the actual order of detention had been passed on the 27th May, 1953. It is contended by Sri *Sri Rama* that the petition having being made after the Advisory Board constituted under the Preventive Detention Act had forwarded its opinion to the

State Government, the detention of the petitioner is justified. The argument in short is that the detention of the petitioner is *now* at all events legal and that this Court cannot or should not therefore grant him the relief asked for by him.

Article 21 of the Constitution guarantees life and personal liberty according to procedure established by law. Article 22 seeks to provide protection against arrest and detention in certain cases. In effect what Article 22(4) does is to lay down that it shall not be open to the Legislature to pass any law authorizing preventive detention of a person for a longer period than three months unless an Advisory Board constituted of persons who are or have been or are qualified to be High Court Judges has reported before the expiration of the said period that there is in its opinion sufficient cause for such detention. There is a further proviso that nothing in that sub-clause shall authorize the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (*b*) of clause (7). The Advisory Board has been constituted as a safeguard against a possible misuse of the power of preventive detention. The Advisory Board is not a judicial body; it does not follow strict judicial procedure; it is in fact in the nature of a body charged with the responsibility of advising the executive government in regard to cases of preventive detention where it is intended that such detention shall last for more than three months. I cannot therefore accept the contention that we have any concern with the proceedings of the Advisory Board. The fact that the Constitution has provided an Advisory Board for advising on cases of preventive detention does not mean that the right of this Court to grant a writ of *habeas corpus* in cases where the

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initial arrest in the opinion of this Court was illegal or improper has been taken away

I agree with the view which has been expressed by WANCHOO, C. J., in the case of *Durga Singh* v. *The State* (1) that the fact that an applicant's case has been considered by the Advisory Board can make no difference to the order that we can pass in the circumstances of his case

The question which has to be considered is whether all the grounds supplied to the petitioner are of a nature sufficient to enable him to make a proper representation The view which has been taken by their Lordships of the Supreme Court in *Ram Krishan Bhardwaj* v. *State* (2) is that preventive detention being a serious invasion of personal liberty the duty of the courts is to make sure that such meagre safeguards as the Constitution provides against its improper exercise are strictly enforced The learned CHIEF JUSTICE points out that the petitioner has a right under Article 22 (5) to be furnished with particulars of the grounds of his detention sufficient to enable him to make a representation which on being considered may give relief to him The learned CHIEF JUSTICE goes on to observe that this constitutional requirement must be satisfied with respect to each of the grounds communicated to the person detained subject of course to a claim of privilege under clause (6) of Article 22

Sri *S N Dhawan* who appears for the petitioner has invited our attention to the grounds furnished to the petitioner and has contended that three of them are of a most unsatisfactory nature namely grounds nos 6 7 and 12 In ground no 6 it is stated that the petitioner had been planning designs with some [illegible]

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or three others for getting the house of the millowners Messrs Ramdayal Chhitarmal looted and for bringing them to humiliation and disrepute It will be seen that neither the time nor the place nor the names of the persons with whom he was planning have been disclosed

In ground no 7 it is alleged against the petitioner that he had been threatening the labour class which had not joined hands with him to leave the mills and join with him a specific instance has also been mentioned in the second part of this ground No particulars of the labour class or of the mills have been given in this ground I may say that I should not have been disposed to look upon either of the grounds nos 6 and 7 as fatal had it not been for ground no 12 I shall therefore come to ground no 12

In that ground it is said that the petitioner had sponsored led and organized two illegal strikes in which breaches involving peace and public disturbance occurred Neither the time nor the place of these strikes has been mentioned in this ground whether these strikes were organized in Agra or somewhere else is not at all clear from it It cannot be said from reading it what the period when these strikes were organized was Though these strikes are described as illegal the matter in connection with which they were organized is not indicated I am therefore driven to the conclusion that the grounds are unsatisfactory As PATANJALI SASTRI C J points out the fact that the petitioner would suffer no hardships or prejudice by reason of sufficient particulars not having been already furnished to him is immaterial

> The question however is not as he puts it whether the petitioner will in fact be prejudicially affected in the matter of securing his release

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MUKERJI J.

by his representation but whether his constitutional safeguard has been infringed

This is a case in which possibly good grounds for detention have been mixed up with vague indefinite and bad grounds Having regard to the fact that the view which the Supreme Court has taken is that the petitioner's detention cannot be held to be in accordance with the procedure established by law within the meaning of Article 21 unless the constitutional requirement with respect to each of the grounds communicated to the person detained subject to a claim of a privilege under clause (6) of Article 22 is satisfied there is no alternative before us but to direct release of the petitioner

The petitioner must therefore succeed and I agree with the order of my brother MOOTHAM that the petitioner be released forthwith

BY THE COURT —The petition is allowed with costs The petitioner is entitled to be released and we direct that he be set at liberty forthwith

Petition allowed

CIVIL MISCELLANEOUS

Before Mr Justice Dayal and Mr Justice Bhargava

BRIJ KISHORE AND ANOTHER (APPLICANTS)

v

THE RENT AND EVICTION OFFICER KANPUR AND ANOTHER (OPPOSITE PARTIES)

1953
November 24

Uttar Pradesh (Temporary) Control of Rent and Eviction Act, 1947 *s 7(f) Scope of—Demise by a tenant of a portion of an accommodation let to him—It amounts to vacation of that portion*

Demise by a tenant of a portion of the accommodation let to him does not amount to a tenant s vacating that portion of the accommodation and does not give any right to the Rent Control and Eviction Officer to allot such portion of the accommodation to another person

S 7(f) of the Control of Rent and Eviction Act does not provide any right to an aggrieved person to approach the State Government to raise an order passed by the Rent Control and Eviction Officer

Civil Miscellaneous no 284 of 1953

The facts appear in the judgment

S K Verma for the applicants

The Standing Counsel (*Gopalji Mehrotra*) for the opposite parties

The judgment of the Court was delivered by—

DAYAL J —This is an application under Article 226 of the Constitution of India praying that a writ order or direction in the nature of *certiorari* be issued to the opposite party no 1 that is the Rent Control and Eviction Officer and Magistrate Kanpur and the order of allotment dated the 4th of March 1953 passed by opposite party no 1 in favour of opposite parties nos 2 and 3 namely he Annapurna Cafeteria

1953

BEFORE
KAILASH NATH
AND
TEJ BAHADUR
JUDGES

THE OFFICER
KANPUR

Dec 11

Kanpur through the Secretary District Food Advisory Committee Kanpur and Mrs Rathore President, District Food Advisory Committee Kanpur be quashed

The facts leading to this application are

The applicants are the landlords of certain building in a compound with one municipal number 17/3 situated on the Mall Kanpur of the various buildings on this land one was let out to one Sri Uma Shankar Mehrotra son of Sri Bhupat Prasad Mehrotra several years ago Sri Uma Shankar Mehrotra whose father Sri Bhupat Prasad Mehrotra carried on a business in the name of S Varma in that portion of the accommodation was in occupation of that portion on the 5th of March 1953 when according to the allegations in the affidavit filed in support of this application opposite party no 1 namely the Rent Control and Eviction Officer and Magistrate Kanpur passed the allotment order under section 7 of the United Provinces (Temporary) Control of Rent and Eviction (Amendment) Act (Act XLIV of 1948) ordering the applicants to let out the portion previously occupied by Sri S Varma to the Annapurna Cafe and Kanpur The landlord applicants received this order on the 11 h of March 1953

On 5th March 1953 according to the admitted case of the parties a letter addressed to Mool Chand instead of being addressed to Mool Narain one of the proprietors of the firm Messrs Brij Kishore Mool Narain (also wrongly described as Messrs Behari Lal Mool Chand) was received from the Rent Control and Eviction Officer asking Mool Narain to see the Additional District Magistrate (City) Kanpur at 4 p m that day in connection with the bungalow in premises no 17/3 previously occupied by Sri S Varma Mool Narain was not in Kanpur on that day and so could not comply with the

request in that letter A similar request was then addressed to him on the 6th of March 1953 requiring him to see the Additional District Magistrate (City) Kanpur just then This peremptory request also could not be complied with as Mool Narain had not returned to Kanpur till then However one Madho Prasad brother in law of Mool Narain met the Additional District Magistrate (City) Kanpur and informed him that the portion, occupied by Messrs S Varma was still in their possession that they had not vacated it nor had they any intention to vacate the same and that therefore no question of allotting it to someone else arose He also informed the Additional District Magistrate when the question of certain repairs was raised by the latter that under the contract of tenancy between the landlord and the tenant it was the tenant who was bound to carry out the necessary repairs All this in connection with the two letters and the meeting between Madho Prasad and the Additional District Magistrate (City) Kanpur was repeated in a letter which Mool Narain sent to the Additional District Magistrate on the 9th of March 1953

The allotment order served on the applicants which is Annexure D to the application is dated the 4th of March 1953 and is with respect to the premises no 17/3 except one room on the back the previous occupier of which was Sri S Varma The validity of this order is challenged on the ground that the accommodation in dispute has never fallen vacant prior to the allotment order and that therefore the allotment order was without jurisdiction and was *ultra vires* on the Rent Control and Eviction Officer Another ground urged was that the accommodation in suit formed part of a larger accommodation and that the landlords themselves being in occupation of the other portion it was

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Kapur, J.

incumbent to consult them before this portion could be let out to others

So far as the second ground is concerned it was mentioned in the counter affidavit and is not disputed that there are several houses in the compound of premises no. 17/3 and that the accommodation in occupation of the applicants is not contiguous with the accommodation in suit. The various residences in the compound are separate independent units. The second objection therefore has no force.

With respect to the first contention it was mentioned in the counter affidavit filed on the 15th of April 1953 by the Rent Control and Eviction Officer himself that Sri Bhupat Prasad Mehrotra had allowed one Sri B. D. Khanna to occupy the premises in dispute without any legal authority and that the letter dated the 5th of March 1953 was issued to Sri Brij Kishore and Sri Mool Narain requesting them to contact the Additional District Magistrate (City) for the purpose of deciding the terms of tenancy after the allotment had been made. There was nothing in the letter to indicate this and it does not appear why the Additional District Magistrate (City) Kanpur was to decide the terms of tenancy when the allotment was made by the Rent Control and Eviction Officer who could be the best person to decide the terms of tenancy if this matter was at all to be decided by the Rent Control and Eviction Officer. Ordinarily we think that this should have been the matter for decision between the landlords and the prospective tenant. There is nothing on the record to show and it does not appear probable that the Additional District Magistrate (City) was authorized by the District Magistrate of Kanpur to perform any of the functions of the District Magistrate under the Rent Control and Eviction Act

It was further mentioned in the counter affidavit that the allotment order dated the 5th of March 1958 was served on the landlord just after the date of the allotment but they evaded its receipt and it was finally served on them on the 11th of March 1958 This assertion is self contradictory and meaningless If the allotment order had been served on the landlord on the 5th of March 1958 there was no question of its being finally served on the 11th of March If there were any question of the landlords giving any receipt in token of having received the order no such receipt seems to have been given by the landlords on the 11th of March 1958 as none has been produced in court We have not been referred to any papers in support of this assertion in the counter affidavit that the allotment order was served on the landlords on the 5th of March However the actual date of the service of the allotment order is not very material for purposes of this case

It was alleged that the allottee secured possession on the 6th of March 1958 and that it was false that the original tenant was in occupation of the accommodation in suit

It was also denied that the allotment order was made on the 4th of March 1958 It was alleged that it was made on the 5th of March 1958 No explanation however has been given in this counter affidavit as to how the allotment order (Annexure D to the application) which has been filed by the applicants bears the date 4th March 1958 No allegation is made that this is not the order served on him or that any tampering has been done with the date on it or on any other portion of this allotment order

It was also mentioned in this counter affidavit that a notice was issued to the landlords on the 2nd of March 1958 informing them to appear before the Rent Control and Eviction Officer on the 5th of March 1958 to

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and others

file objections if any against the allotment of premises no 17/3 and that the landlords did not receive the notice it was served by affixation No documents were filed along with this affidavit in support of the allegations made therein

A rejoinder affidavit was filed by the applicants on the 22nd of April 1953 Its copy was delivered to the Standing counsel on the 21st of April 1953 On 20th April 1953 a supplementary counter affidavit was sworn by the Rent Control and Eviction Officer its copy was handed over to learned counsel for the applicants on the 21st of April 1953 and it was filed in court on the 28th of April 1953 In this supplementary counter affidavit, it was mentioned that the Kanpur Branch of the Women's Food Council was in search of a suitable accommodation for their Cafetaria and applied to the authorities for a suitable place No such application has been produced We are informed that no written application was presented The supplementary counter affidavit goes on to say that on the 19th of February 1953 the Senior Inspector (Housing) submitted a report to the deponent that the premises in dispute with the exception of one room were in illegal and unauthorized occupation of one B D Khanna that only one room was in the occupation of Sri Bhupat Prasad Mehrotra the tenant of the premises that enquiry revealed that B D Khanna had been occupying that portion for about a year that the Rent Control and Eviction Officer visited the premises on the 20th of February 1953, and that the members of the Women's Food Council visited it on the 22nd of February 1953 They approved of the building as the suitable place for the Annapurna Cafetaria On 24th February 1953 the Rent Control and Eviction Officer ordered issue of notice to the landlord applicants with regard to the allotment of the premises in dispute

to the Annapurna Cafetaria. A copy of the notice was filed with this affidavit. It shows that it was issued on the 2nd of March 1958. The endorsement at the back of this notice is to the effect that Behari Lal Mool Chand refused to accept the notice and that the notice was therefore affixed in the presence of two witnesses. It is amusing to see this report of the person who went to serve the notice. It does not show who actually refused to accept the notice and to whom it was tendered. It is too much to suppose that the employees of the office of the Rent Control and Eviction Officer expected a firm as such to accept the notice.

The supplementary counter affidavit further said that prior to the 5th of March 1958 the Rent Control and Eviction Officer received a letter from Sri Uma Shankar dated the 28th of February 1958 to the effect that the premises in dispute with the exception of one room was vacant. A copy of the letter has been filed. It does not support these allegations. The letter is not by Uma Shankar but is by Bhupat Prasad for S. Varma. The letter did not show that Bhupat Prasad Varma or Uma Shankar Mehrotra had vacated the premises. It simply said that it was being confirmed that his refugee relations residing with him had vacated the premises the possession of which would be handed over to the nominee of Sri Samuddin, Additional District Magistrate (City) Kanpur. The letter further made a request that according to the verbal agreement one back big room with two adjoining side rooms on the right hand side of the premises in question including the motor garage, which had been constructed by him would remain in his possession for which reasonable rent would be fixed by the Rent Control and Eviction Officer. The premises in dispute it appears had included the two adjoining side rooms and also a motor garage which was constructed by him besides one big room at the back.

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Ramaswami J.

It letter further said that it had also been agreed upon that whenever the premises would be vacated by the Cafetaria, the possession of the same would be given to him in good condition It is interesting to note that the tenant was stipulating to get back the premises in good condition while the premises were supposed to be so bad in condition that it necessitated a prompt meeting between the landlord and the Additional District Magistrate on the 9th of March 1953

A copy of the allotment order was filed along with the supplementary counter affidavit to bear out the assertion that the allotment order was made on the 9th of March 1953 This does not improve matters in the absence of any explanation as to why the order served on the landlords bore the date 4th March 1953 It is also mentioned in the supplementary counter affidavit that in connexion with the letter of the landlords to the Additional District Magistrate (City) dated the 9th of March 1953 the Rent Control and Eviction Officer submitted a report on the 10th of March 1953 Annexure I is a copy of the report This report shows along with other things that the fact of vacancy had been conveyed to the Additional District Magistrate on phone by the tenant himself on the 27th of February 1953 that as regards notice to the landlord he must have had personal conversation with the Additional District Magistrate quite a few times by that time and that he had got sufficient notice in that behalf What the Rent Control and Eviction Officer or the Additional District Magistrate expected from the landlords in this connexion we fail to imagine Why should the landlords have been sent for in this connexion The question was about notice to them and not about their seeking audience with those officers Further this report said that the matter had been thoroughly looked into by each one of them including

the District Magistrate and possession had also been secured by the Additional District Magistrate (City) We fail to see how possession had been obtained by the Additional District Magistrate (City) Kanpur who had nothing to do with the matter either as a Rent Control and Eviction Officer or as an office bearer of the Annapurna Cafetaria The report further said that the repairs could be undertaken at once and as the Additional District Magistrate (City) had himself seen the building in a bad condition it needed very extensive repairs and that under section 7 D(1) of the Act if the landlords refused to restore the amenities of proper roofing white washing etc the tenant could get it restored on his own and the cost of repairs could be adjusted towards the rent On this report of the Rent Control and Eviction Officer Sri Samiuddin Additional District Magistrate (City) ordered the Rent Control and Eviction Officer to take necessary action and let him know at once On the 12th of March 1953 the Rent Control and Eviction Officer reported that action had already been taken What that action was and who took it is not clear If any of these two officers namely the Rent Control and Eviction Officer or the Additional District Magistrate (City) Kanpur had taken this action that would not be covered by the provisions of section 7 D(4) of the U P (Temporary) Control of Rent and Eviction Act (Act no III of 1947) which is

> 7 D(4)—If the landlord fails to restore the said amenities within the time fixed by the District Magistrate it shall be competent for the District Magistrate to direct that the tenant may have such amenities restored and the cost thereof may be deducted from the rent which is payable to the landlord

If the action taken was simply to inform the prospective tenant that he was *per se* to undertake the

repairs that may come under these provisions There is nothing on the record to show what particular extensive repairs were necessary to bring back the property which had been in actual possession may be of an unauthorized person B D Khanna It is in connexion with these repairs that the supplementary counter affidavit mentions that the Annapurna Cafetaria had spent over Rs 2 000 in making necessary repairs In the supplementary rejoinder affidavit two assertions deserve mention One is with respect to the alleged notice issued on the 2nd of March to the landlords to meet the Rent Control and Eviction Officer on the 5th of March and submit their objections to the allotment It is alleged that the 2nd and 3rd of March 1953 were holidays on account of Holi The other is that the copy of the allotment order filed with the supplementary counter affidavit does not agree with the allotment order served on the applicants not only with respect to the date but also with respect to the description of the specification of the premises The allotment order served on the applicants mentioned the specification as 17 73 (except one room in the back) whereas the copy filed with the supplementary counter affidavit mentions the specification as 17 73 (except one back room)

The learned Standing Counsel has mainly relied on two grounds in submitting that the applicants could not get any relief by this writ petition One is that they had an alternative adequate remedy in view of the provisions of section 7 F of the U P (Temporary) Control of Rent and Eviction Act which runs as follows

> 7 F The State Government may call for the record of any case granting or refusing to grant permission for the filing of a suit for eviction referred to in section 8 or requiring any accommodation to be let or not to be let to any person under section

7 and may make such order as appears to it necessary for the ends of justice

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Dayal J

We are of the opinion that this section does not afford any alternative remedy to the applicants The applicants have not been given any right to approach the State Government to revise the order passed by the Rent Control and Eviction Officer This section just empowers the State Government to call for the record and make suitable orders The applicants, therefore can not approach the State Government by way of appeal or revision against the order of the Rent Control and Eviction Officer Further in view of how things have taken place, the applicants cannot be blamed if they did not think of approaching the State Government Sufficient indication has been given above to show that the officers of the district, including the Rent Control and Eviction Officer, had taken interest in this matter much beyond what is expected from a Rent Control and Eviction Officer in the discharge of his functions under the U P (Temporary) Control of Rent and Eviction Act (Act III of 1947) It is clear that the premises were not vacant when they were inspected and approved for occupation by the Annapurna Cafetaria by the members of its advisory body or by the Rent Control and Eviction Officer or by the Additional District Magistrate (City) Kanpur Nothing is shown why the Additional District Magistrate should have officially taken interest in this matter even if he was interested in this Cafetaria and should have issued orders to the Rent Control and Eviction Officer which he rightly complied with We have already referred to the letter of Sri B P Varma dated the 28th of February 1953 a copy of which was filed along with the supplementary counter affidavit That letter referred to three letters from the Rent Control and Eviction Officer to Sri Uma Shankar Mehrotra son of Sri B P Verma and also to

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some verbal agreement between Sri Uma Shankar and Sri Samiuddin Additional District Magistrate (City) As the learned Standing Counsel laid great stress on this question of alternative remedy we asked him to file the three letters referred to in this letter of the 28th of February 1953 The first letter, dated the 24th of February 1953 refers to some telephonic conversation between Sri Uma Shankar and the Rent Control and Eviction Officer Sri M Saidullah who informed him that he was making arrangements for providing suitable alternative accommodation for Sri B D Khanna and his other family members and hoped that they would be good enough to vacate the premises no 17/3 the Mall Kanpur as it was needed by Mrs Munshi who had already inspected the premises According to the counter affidavits B D Khanna was the person who had occupied the premises in suit without any authority and had been occupying it for a year The Rent Control and Eviction Officer could have taken legal action against him instead of showing such solicitude for him and depending on his goodness to get the premises vacated The second letter dated the 26th February 1953 shows that there had been fair response from Sri Uma Shankar Mehrotra though Khanna was not very helpful In this letter it was mentioned that the Rent Control and Eviction Officer was under no obligation to the illegal occupier though he was under obligations to the tenants of the premises The third letter dated the 27th February 1953 shows that the Additional District Magistrate (City), Kanpur, had informed the Rent Control and Eviction Officer that the premises would be vacant on the 1st March 1953 it refers to the efforts on the part of the Rent Control and Eviction Officer to contact the landlord who incidentally was reported to be deaf and dumb but his representative had not yet met him Considering this zealousness on the part of the local officer in connexion with the

vacation of the premises and its allotment it can be said as already mentioned that the applicants need not be blamed if they did not approach the State Government because they could have presumed that the officers of the State Government must have taken such an interest under some inspiration however wrong that notion might have been We are therefore of the opinion that the applicants are not deprived of getting their grievances remedied by a writ application on account of the provisions of section 7 F of the U P (Temporary) Control of Rent and Eviction Act 1947

The second point raised for the opposite parties was that the order impugned was an order passed by the Rent Control and Eviction Officer within his jurisdiction as the premises in suit had fallen vacant It was therefore submitted that the order was not to be interfered with in the exercise of our jurisdiction under Article 226 of the Constitution

Section 7 of the U P (Temporary) Control of Rent and Eviction Act (Act III of 1947) runs as follows

> 7 (a) The District Magistrate may by general or special order require a landlord to give information that any accommodation of which he is the landlord is or has fallen vacant and to let or not to let such accommodation to any person
>
> (b) In any case where in pursuance of an order of the District Magistrate passed under clause (a) aforesaid the vacancy of any accommodation is required to be reported the tenant occupying such accommodation shall within seven days of his vacating the same give intimation thereof in writing to the District Magistrate or such officer as the District Magistrate may appoint in this behalf
>
> Provided that in making the first allotment in the case of any accommodation constructed after the 1st July 1946 the District Magistrate shall allot it

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(Sahai, J.)

to the owner, if the owner not being in occupation of any other house owned by him in that municipality or other contiguous area to which the Act applies genuinely requires such accommodation for his own residence

Explanation—A newly constructed accommodation shall be deemed to be vacant as soon as it is fit for occupation

The vacancy of an accommodation referred to in this section means the vacancy of the entire accommodation in the tenancy of any person and cannot refer to the tenants not using for the time being part of the accommodation which had been let out to him as a result of the transaction of the contract of tenancy between him and the landlord If a tenant vacates a portion of the accommodation in his tenancy and lets any other person occupy it the other persons would be the tenant's sub tenant and cannot become the tenant of the landlord So far as the landlord is concerned, the original tenant continued to be his tenant till his tenancy comes to an end in any of the recognized manners If the vacancy of the accommodation contemplated by section 7 included the vacancy of a portion of the accommodation let to a tenant it may result in anomalous situations The landlord has no reason to know of the partial disuse of the accommodation let out to the tenant He cannot give any notice to the District Magistrate under clause (*a*) of sub section (1) of section 7 of the Act The original tenant continues to be his tenant and the landlord therefore cannot accept another person to whom the Rent Control and Eviction Officer allots the part of the accommodation on being informed by the tenant that he does not want to use that portion of the accommodation let out to him The new allottee cannot, therefore be the tenant of the landlord and cannot be the sub tenant of the original

tenant in view of the allotment order there being no contract of tenancy between him and the sub tenant. The landlord may also bring himself within the mischief of sections 8 and 11 of the U. P. (Temporary) Control of Rent and Eviction Act 1947. We therefore, hold that the disuse by a tenant of a portion of the accommodation let to him does not amount to the tenant's vacating that portion of the accommodation and does not therefore give any right to the Rent Control and Eviction Officer to allot such portion of the accommodation to another person. It follows therefore that the Rent Control and Eviction Officer's order allotting the premises no. 17/3 with the exception of one back room in the occupation of S. Varma to the Annapurna Cafetaria was an order which he had no right to pass and therefore, that order should be set aside.

Learned counsel for the opposite parties further submitted that if the tenant could not vacate the portion of the accommodation the allottee in the present case, would be the sub tenant and the applicants could therefore take legal action against the tenant for sub-letting in view of section 3(1) (*e*) and section 7(3) of the Act. We have already indicated that the order of the Rent Control and Eviction Officer is not an order to the effect that the Annapurna Cafetaria would be a sub tenant of the tenant. The order is directed against the landlords and is with respect to the Annapurna Cafetaria becoming the tenant of the accommodation in suit. Further section 7(3) provides:

> 7(3) No tenant shall sublet any portion of the accommodation in his tenancy except with the permission in writing of the landlord and of the District Magistrate previously obtained.

It follows that the Rent Control and Eviction Officer's order alone could not have been sufficient for the creation of the sub tenancy in favour of the Annapurna

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DIXIT J.

Cafetaria. There should also have been the consent of the landlords in writing. It would thus appear that the Rent Control and Eviction Officer's order of allotment if given effect to as an order creating the sub tenancy, would amount to condoning an order of the Rent Control and Eviction Officer which he could not have legally passed.

In view of the above we quash the order of allotment passed by the Rent Control and Eviction Officer in favour of the Annapurna Cafetaria opposite party no. 2 on the 4th or 5th of March, 1953 with respect to premises no. 17/3 the Mall Kanpur except one back room previously in the occupation of Sri S. Varma. We further order opposite party no. 1 on whose behalf the case was contested to pay costs to the applicants which we assess at Rs. 200.

We order that the three letters filed by the learned Standing Counsel under our direction be returned to him.

Order accordingly.

(FULL BENCH) CIVIL MISCELLANEOUS

Before Mr Justice Sankar Saran, Mr Justice Bind Basni Prasad and Mr Justice Kaul

SURAJ MAL (APPLICANT)

v

THE BOARD OF REVENUE U P AND OTHERS (OPPOSITE PARTIES)

1952 November 9 — 1953 September 23

Code of Civil Procedure, 1908, *Order XLI r 30—Judgment given by a single Member of Board of Revenue—Judgment sent to another Member for concurrence—Judgment, if can be given without hearing parties or their counsel*

When a single Member of the Board of Revenue has given a judgment modifying or reversing the order or decree under consideration and sends it to another Member of the Board of Revenue the latter cannot give a judgment without giving the parties or their pleaders an opportunity of a hearing as required by Order XLI r 30 of the Code of Civil Procedure

Ram Manohar v Board of Revenue (1) overruled

Civil Miscellaneous no 7795 of 1951

The facts appear in the judgment

Harish Chandra Sharma for the applicant

Satish Chandra for the opposite parties

BIND BASNI PRASAD, J —This is an application under Article 226 of the Constitution arising out of an appeal which has been decided by the Hon ble Board of Revenue of Uttar Pradesh (hereinafter referred to as the Board) The relevant facts are that a suit under section 59 of the United Provinces Tenancy Act 1939 (hereinafter referred to as the Act) was filed by the opposite party no 2 against the applicant and opposite parties nos 3 to 7 claiming that he was the sole tenant of

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Rauf, Bajpai
Pronounced J.

the land in dispute The applicant contended that he was a joint tenant with opposite parties nos 2 to 5 Opposite parties nos 6 and 7 were the zamindars The trial court dismissed the suit but on appeal the Additional Commissioner allowed the appeal and decreed the suit holding that opposite party no 2 alone was the tenant of the land in dispute The applicant filed Second Appeal no 691 of 1949 50 before the Board and it came up for hearing on the 15th March 1951 before Sri T N Srivastava one of the Judicial Members of the Board After hearing arguments, he delivered a judgment on the same date by which he allowed the appeal and set aside the decree of the learned Additional Commissioner restoring the decree of the trial court As required by rule 170 of the Revenue Court Manual the judgment was sent for concurrence to Sri R N Singh another Judicial Member of the Board who without hearing the parties wrote his judgment on the 7th April 1951, disagreeing with Sri T N Srivastava and proposing the dismissal of the appeal The judgments of both the Hon'ble Members were then sent to a third Judicial Member viz Sri A Rauf who by his judgment dated the 12th April 1951 concurred with the judgment of Sri T N Srivastava These three judgments were then sent to Sri J O N Shukla the fourth Judicial Member who by his judgment dated the 25th April 1951 disagreed with the judgment of Sri T N Srivastava and agreed with Sri R N Singh It appears that there was a meeting of the Members on the 28th April 1951 and it was agreed that the Additional Commissioner's judgment should be upheld The appeal was accordingly dismissed

The contention on behalf of the applicant is that having regard to the provisions of Order XLI rule 30 of the Code of Civil Procedure (hereinafter referred to as the Code) the judgments of Sarvasri R N Singh,

A Rauf and J O N Shukla are no judgments because they were delivered without giving an opportunity to the parties to be heard This point came up before a Bench of this Court in *Ram Manohar v Board of Revenue, U P* (1) and the contention that the other Member should have heard the parties was repelled In view of this decision the Division Bench has referred the following point for decision by a Full Bench

> When a single Member of the Hon ble Board of Revenue has given a judgment modifying or reversing the decree under consideration and sends it to another Member of the Board of Revenue can the latter give a judgment without hearing the parties or their pleaders as required by rule 30 of Order XLI of the Code of Civil Procedure

I am conscious of the fact that the procedure which the Hon ble Members of the Board of Revenue have followed has been long in vogue in the Board I am reluctant to disturb such a long standing practice unless the law compels me to do so The point involved is essentially one of procedure I have arrived at the conclusion that such a procedure is not warranted by the law

Section 243 of the United Provinces Tenancy Act 1939 which applied at the time when the appeal was heard by the Board provides as follows

> 243 (1) The provisions of the Code of Civil Procedure except—
>
> (*a*) provisions inconsistent with anything in this Act, so far as the inconsistency extends
>
> (*b*) provisions applicable only to special suits or proceedings outside the scope of this Act, and

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(c) the provisions contained in List I of the Second Schedule

shall apply to all suits and other proceedings under this Act subject to the modifications contained in List II of the Second Schedule

(2) The rules mentioned in the Second Schedule of this Act shall be interpreted, in the case of Agra, as referring to rules contained in the First Schedule to the Code of Civil Procedure 1908 as altered or added to by the High Court of Judicature at Allahabad under section 122 of the Code of Civil Procedure, 1908 and in the case of Oudh as referring to rules contained in the First Schedule to that Code as altered or added to by the Chief Court of Oudh under section 122 of that Code

From List I of the Second Schedule it will be seen that no rule of Order XLI or XLII of the Code of Civil Procedure has been exempted in its application to cases under the Act Order XLI deals with appeals from original decrees and Order XLII with appeals from appellate decrees Order XLII contains only one rule which provides as follows

> The rules of Order XLI and Order XLI A shall apply so far as can be to appeals from appellate decrees '

For detailed provisions to be followed in second appeals we must therefore turn to Order XLI

Now List II of the Second Schedule of the Act, contains the modifications subject to which certain provisions of the Code apply to cases under the Act Section 98 of the Code provides for decisions where appeal is heard by two or more Judges Serial no 5 of List II contains the following modification to section 98

> Nothing in this section shall require two members of the Board to sit together in the exercise of appellate or revisional jurisdiction under this Act

Serial no 14 of list II contains the following modification to rules 30 and 31 of Order XLI of the Code

> No judgment of the Board need be dated or signed or pronounced in open court

Rule 30 of Order XLI of the Code provides as follows

> The appellate court, after hearing the parties or their pleaders and referring to any part of the proceedings whether on appeal or in the court from whose decree the appeal is preferred to which reference may be considered necessary shall pronounce judgment in open court either at once or on some future day of which notice shall be given to the parties or their pleaders

The important point to note in the above rule is that it requires the parties to be heard before the appellate court gives the judgment This provision has not been exempted nor modified in its application to the appeals under the Act

I may refer also to rule 170 contained in the Revenue Court Manual It provides

> When the Board has distributed its appellate business among the Members the order of a single Member as the order of the Board but no decree or order coming under the consideration of the Board in appeal shall be modified or reversed without the concurrent judgment of two Members of the Board

This exhausts all the relevant provisions of law bearing upon the point under consideration which have been placed before us The position is that according to section 98 of the Code as applied after modification to appeals under the Act it is not necessary for two Members of the Board to sit together to hear an appeal

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Sinha, C. J. and Bose, J.

A single Member may hear an appeal If he dismisses an appeal then his judgment according to rule 170 of the Revenue Court Manual will be the judgment of the Board But if he proposes to reverse or modify a decree then there must be the concurrent judgment of another Member of the Board Under rule 30 of Order XLI of the Code there can be no judgment by an appellate court without hearing the parties The other Member to whom the appeal is referred is a Member of the appellate court All Members who participate in the decision of an appeal whether agreeing with or dissenting from the judgment of the Member who originally heard the appeal are according to rule 30 of Order XLI of the Code bound to give an opportunity of hearing to the parties This rule is based upon the elementary principle of judicial procedure that no judgment should be given by a court or a tribunal without giving an opportunity of hearing to the parties The hearing of the parties goes a great way in the elucidation and thrashing out of the points involved in a case It gives satisfaction to the parties Justice should not only be done but it should appear to be done As the law is at present a member of the Board may sit hear and decide an appeal or revision singly If he proposes to dismiss it his judgment will be the judgment of the Board But if he proposes to reverse or modify a decree or an order he must refer it to another member and the latter cannot give his judgment without giving an opportunity of hearing to the parties The two members may not sit together to decide the appeal or revision but each of them must give the parties an opportunity of hearing separately though it may be before recording the judgment In *Ram Manohar v. Board of Revenue U. P.* (1) the effect of Order XLI rule 30 of the Code of Civil Procedure was

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considered Reading it along with rule 170 of the Revenue Court Manual SAPRU J, observed

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Bind Basni
Prasad J

> It is urged that the expression appellate court here means both the Members of the Board We are unable to read any such meaning into the words appellate court as used in this rule The appellate court was according to rule 170 the Member hearing the parties but his judgment or order had to be concurred in by the other Member This is the position as we see it under this rule

With the greatest respect I find myself unable to agree with the above reasoning

The expression appellate court is not defined in rule 170 or anywhere else On the other hand there is intrinsic evidence in rule 170 itself to show that a single Member who hears the appeal is not the appellate court, for it is provided in that rule that if the single Member proposes to reverse or modify the decree or order under consideration then his judgment would not be the judgment of the Board For his judgment to be effective the concurrent judgment of another Member of the Board is essential In the absence of a definition of the expression appellate court in the Revenue Court Manual or in the Code it must be given its plain ordinary meaning It means all the Members of the Board who participate in the decision of the appeal or the revision according to the rules The other Member of the Board to whom the single Member of the Board hearing the appeal or revision sends his judgment for concurrence is as much a part of the appellate court as the single Member himself For these reasons I would dissent from the view expressed in *Ram Manohar's* case (1)

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I would answer the question referred by the Division Bench as follows

When a single Member of the Board of Revenue has given a judgment modifying or reversing the order or decree under consideration and sends it to another Member of the Board of Revenue the latter cannot give a judgment without giving the parties or their pleaders an opportunity of a hearing as required by rule 30 of Order XLI of the Code of Civil Procedure

KAUL J —I agree

SANKAR SARAN J —I agree and have nothing to add

BY THE COURT —The answer to the question referred by the Division Bench is as follows

When a single Member of the Board of Revenue has given a judgment modifying or reversing the order or decree under consideration and sends it to another Member of the Board of Revenue the latter cannot give a judgment without giving the parties or their pleaders an opportunity of a hearing as required by rule 30 of Order XLI of the Code of Civil Procedure

[On receipt of the opinion of the Full Bench the case was laid before the original Bench for final orders]

HARISH CHANDRA J —The facts of the case are given in the order of reference of the Bench of which one of us was a member The following question was referred to a Full Bench of this Court for decision

'Q —When a single Member of the Hon ble Board of Revenue has given a judgment modifying or reversing the decree under consideration and sends it to another Member of the Board of Revenue, can the latter give a judgment without hearing the parties or their pleaders as required by rule 30 of Order XLI of the Code of Civil Procedure ?

The Full Bench has given the following answer to the above question referred to it for decision

> When a single Member of the Board of Revenue has given a judgment modifying or reversing the order or decree under consideration and sends it to another Member of the Board of Revenue the latter cannot give a judgment without giving the parties or their pleaders an opportunity of a hearing as required by rule 30 of Order XLI of the Code of Civil Procedure

The Board of Revenue delivered the judgment in question on the 28th of April 1931 This judgment was delivered after a consultation had taken place between all the four Members of the Board three of whom had not heard the appeal at all In view of the decision of the Full Bench the order passed by the Board of Revenue was without jurisdiction and it is therefore quashed

Application allowed

CIVIL MISCELLANEOUS

Before the Honourable B Malik Chief Justice and Mr Justice Bhargava

MESSRS MUNSHIRAM KASHINATH
DEHRA DUN (APPLICANT)

April 3

v

COMMISSIONER OF INCOME TAX
(OPPOSITE PARTY)

Excess Profits Tax Act, 1940, s 2(1)(*b*) sch 1 r 9—*Four contracts secured by assessee between 25th November 1941 and 18th February 1942—Chargeable accounting period for the [illegible] 1942 [illegible] whether from 25th November 1941 to 31st March 1942 and from 1st April 1942 to 31st March 1943*

The assessee M K an unregistered firm deals in taking building contracts from the military It started its business on the 25th November 1941 and between 25th November 1941 and 18th February 1942 it secured four contracts In the building agreement it was provided that M K would have to look after the maintenance of building for a period of one year after its completion which ended on the 30th November 1942 M K claimed that up to 31st October 1943 it had spent a sum of Rs 21 320 in the maintenance of building and the military department had withheld a portion of payments due under the bills submitted by it and Rs 38 210 12 and Rs 48 57 were paid to it during the accounting years 1943 44 and 1944 45 respectively

Upon questions referred

Held that the previous year for the assessment year 1943-44 must be the twelve months ending on the 31st March 1943

Held further that the chargeable accounting period for the assessment year 1942 43 was from the 25th November 1941 to the 31st March 1942 and for the assessment year 1943 44 it was from the 1st April 1942 to the 31st March 1943

Civil Miscellaneous no 141 of 1948

The facts appear in the judgment

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MESSRS MUNSHI RAM KASHI NATH DHIRAJ DAS v. COMMISSIONER OF INCOME TAX

C. S. Saran, L. Chandra and *Sri Ram Bansal* for the applicant

S. C. Das, for opposite party

The judgment of the Court was delivered by—

MALIK C. J.—This case was heard by us on the 4th of October 1950. Almost at the conclusion of the hearing learned counsel for the assessee filed an application under section 66(4) of the Indian Income Tax Act. We decided to issue notice to the Commissioner of Income tax to show cause. The assessee however did not pay the process fee and file the necessary copies of notices as required under the rules and the application was therefore dismissed for want of prosecution on the 31st of October 1950. On the 11th of May 1951 an application was made for setting aside the order dated 31st of October 1950. This application was rejected by a Bench on the 9th of April 1952. A second application filed on the 29th of October 1951 also failed and was dismissed. The application under section 66(4) is thus no longer before us.

As regards the reference under section 21 of the Excess Profits Act and section 66(1) of the Indian Income Tax Act two questions have been referred to us for opinion which are as follows:

> "Q.—1. Whether in the facts and circumstances of the case and in view of the maintenance clause quoted in para 5 of this reference the assessee's previous year for purpose of assessment year 1943-44 should be the financial year dated the 1st April 1942 to 31st March 1943 or it should commence from the 25th November 1941 the date of commencement of business and end on the 31st October 1943 the date of completion of all work under the contract?
>
> "Q.—2. Whether in the facts and circumstances of this case and in view of the maintenance clause

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MESSRS. MESSRS PAU KANDI NATH DHURY DEV & COMPANY v. COMMISSIONER OF INCOME TAX, MADRAS

quoted below in para 5 of this reference the assessee's chargeable accounting period under section 2(1) (*b*) of the E P T Act read with rule 9 Schedule I of the E P T Act should be taken to be from 25th November 1941 to 31st October 1943 (or it should be taken to be from 25th of November 1941 to 31st March 1942 for the purpose of the E P T assessment for the year 1942 43 and from April 1942 to 31st March 1943 for the purpose of E P T assessment for the year 1943 44)

The assessee is an unregistered firm which takes building contracts from the military department The assesee started its business on the 25th of November 1941 and between 25th November 1941 and 18th February 1942 it secured four contracts from the military department In the building agreement it was provided that the assessee would have to look after the maintenance of the building for a period of one year after the completion of the building The building work was completed on 30th November 1942 The assessee claimed that up to the 31st of October 1943 the assessee had spent a sum of Rs 21 320 in the maintenance of the building It is the case of the assessee that the military department had withheld a portion of the payments due under the bills submitted by the assessee and a sum of Rs 38 210 12 was paid to it during the accounting year 1943 44 and a further sum of Rs 48 573 was paid in the next accounting year 1944 45 The questions referred to us relate to the period for which the income should be computed for the purposes of assessment The first question has reference to the computation under the Indian Income Tax Act and the second question refers to the computation under the Excess Profits Tax Act We shall take up each question separately with reference to the facts as given in the statement of the case

The first question is to the effect whether for the purpose of assessment, the financial year from 1st April 1942 to 31st March, 1943 should be the accounting period or the accounting period should be from 25th November 1941 to 31st October 1943

For determination of the previous year the relevant provision of the Income Tax Act defining previous year may be quoted It is to the following effect

2(11)— Previous year means (in respect of any separate source of income profits and gains)—

(a) the twelve months ending on the 31st day of March next preceding the year for which the assessment is to be made or if the accounts of the assessee have been made up to a date within the said twelve months in respect of a year ending on any date other than the said 31st day of March then at the option of the assessee the year ending on the day to which his accounts have so been made up

Provided that where an assessee has once been assessed in respect of a particular source of income profits and gains he shall not in respect of that source exercise this option so as to vary the meaning of the expression previous year as then applicable to him except with the consent of the Income tax Officer and upon such conditions as the Income tax Officer may think fit or

(b) * * * *

(c) where a business profession or vocation has been newly set up in the financial year preceding the year for which assessment is to be made the period from the date of the setting up of the business profession or vocation to the 31st day of March next following

or, if the accounts of the assessee are made up

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MESSRS. MUNSHI LAL KANHAIYA LAL DEALERS IN COTTON v. COMMISSIONER OF INCOME-TAX

March, 31

to some other date than the 31st day of March then at the option of the assessee the period from the date of the setting up of the business profession or vocation to such other date

Provided that when such other date does not fall between the setting up of the business, profession or vocation and the next following 31st day of March, it shall be deemed that there is no previous year

The previous year for purposes of assessment during the year 1942-43 will obviously have to be determined in accordance with the provisions of section 2(11) (c) though that matter has not been referred to us It will appear from the statement of the case that the Tribunal by an order dated the 22nd of February 1947 upheld the assessment for the year 1942-43 on the basis of payments received by the assessee up to the 31st day of March 1942 Learned counsel for the assessee disputes this statement of the case but if the facts stated therein are correct, the previous year, for the assessment year 1942-43 must be the year ending on the 31st day of March 1942 We have already said that the accounts of the assessee were not made up till the 31st day of March, 1942 The case of the assessee is that though its business was started on the 25th of November 1941 it did not make up its accounts until the 31st of October 1943 i e until after expiry of a period of about two years The second part of section 2(11) (c) cannot, therefore apply and the previous year for the assessment year 1942-43 would have to be determined in accordance with the first part It is only if the accounts are made up to some date other than the 31st day of March next preceding the year for which the assessment is to be made that the second part can be applicable Where the accounts have not been so made up to a date earlier

than the 31st day of March the previous year must be the period between the date of the new business and the 31st day of March next preceding the year of assessment In this case this would be the period between the 25th of November 1941 and the 31st of March 1942 for the assessment year 1942-43 This point, as we have said earlier has however not been referred to us but we have expressed our view on this question only because it has a material bearing on the question actually referred to us which relates to the assessment year 1943 44

The previous year, for the assessment year 1943 44, must be the financial year ending on the 31st day of March 1943 for two reasons

The first reason is that for the determination of the previous year for the assessment year 1943 44 the provision applicable is the first part of section 2(11) *(a)* of the Indian Income Tax Act The second part of this clause would have been applicable only if the accounts had actually been made up to some date earlier than the 31st day of March 1943 when the assessee might have had the option of treating the twelve months ending on that date as its previous year for the assessment year 1943 44 The facts on the other hand show that the assessee did not make up its accounts until the 31st of October 1943 a date which falls during the assessment year 1943 44 and not during the twelve months preceding that assessment year Since the second part of section 2(11) *(a)* of the Indian Income Tax Act is not applicable the first part would apply and under it the previous year for the assessment year 1943 44 must be the twelve months ending on the 31st day of March 1943

The second reason is that under the proviso to section 2(11) *(a)* an assessee is not entitled to exercise his option granted under that section so as to vary the meaning of the expression previous year if the assessee has once

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MR. AND MRS. HAR KISHAN N. TO DATES DUN

CONSID CONFERRED IN THE TAX

Malik C J

been assessed in respect of a particular source of income profits and gains on the basis of some period as the previous year In this case we have said above that for the assessment year 1942 43 the assessee has already been assessed on the basis of the previous year ending on the 31st day of March 1942 and consequently, he can not vary his previous year except with the consent of the Income tax Officer and upon such conditions as the Income tax Officer may think fit In this case no variation was sought with the consent of the Income tax Officer and consequently the previous year for the assessment year 1943 44 must be the twelve months ending on the 31st day of March 1943 This is our answer to the first question

As regards the second question there is even less to be said Under section 2(1) of the Excess Profits Tax Act, the accounting period' in relation to any business means

(a) where the accounts of the business are made up for successive periods of twelve months each of such periods

(b) in any other case such period as the Excess Profits Tax Officer may determine

The case will come under the second sub head i e where the accounts of the business have not been made up for successive periods of twelve months The proviso to this sub section is to the following effect

Provided that in determining any accounting period under sub clause (b) the Excess Profits Tax Officer shall have regard to the period if any which is or has been determined as the previous year for that business for the purposes of the Indian Income Tax Act 1922

In the case before us the Excess Profits Tax Officer has fixed the same accounting period as the Income tax Officer Though the question was not directly raised

the learned counsel for the assessee tried to urge that the profits should not have been computed till the work under the contract was completed in the year 1944 and the one years period during which the assessee was to maintain the building had expired Learned counsel has gone further and has urged before us that not only till the work under the contract had been completed but till the final payments had been made there should be no compilation of profits Rule 9 of Schedule I of the Excess Profits Tax Act is a complete answer to this contention Rlue 9 Schedule I of the Excess Profits Tax Act reads as follows

> 9 Where the performance of a contract extends beyond the accounting period there shall (unless the Excess Profits Tax Officer owing to any special circumstances otherwise directs) be attributed to the accounting period such proportion of the entire profits or loss which has resulted or which it is estimated will result from the complete performance of the contract as is properly attributable to the accounting period having regard to the extent to which the contract was performed therein
>
> Provided that when any such contract has been completed and the profits have been finally ascertained if the aggregate of the amounts attributed to previous accounting periods exceeds the profit, as finally ascertained from the complete performance of the contract, an adjustment shall be made to reduce the amounts so attributed to the various chargeable accounting periods to the amount of the profits as finally ascertained

Our answer to the second question therefore is that the chargeable accounting period for the assessment year

1942-43 was from the 25th of November 1941 to the 31st of March 1942 and for the assessment year 1943-44 it was from the 1st of April 1942 to the 31st of March 1943

MESSRS MOTI RAM BANKAT NATH DELHI DEC

COMMISSIONER OF INCOME TAX

Malik C.J.

The assessee must pay the cost which we assess at Rs 200

Questions answered

APPELLATE CRIMINAL

Before the Honourable B Malik, Chief Justice and Mr Justice Chaturvedi

STATE

1953 August 5.

v

BALMUKAND

United Provinces Prevention of Adulteration Act, 1912, *proviso (a) to s 6—Invoice of purchase if a written warranty —Alsi oil whether an article of food*

An invoice of purchase is merely a description of articles sold and is not a written warranty within the meaning of proviso (a) to s 6 of the Prevention of Adulteration Act Alsi oil is the same as Linseed oil and is an article of food under s 2 of the Act

Criminal Appeal no 148 of 1951 (connected with Criminal Appeals nos 144 of 1951 146 of 1951 and 420 of 1951), from an order of R D Pandey Additional Magistrate first class Naini Tal dated the 10th March 1950

The facts appear in the judgment

The Government Advocate (*P N Chaudhry*) for the State

B D Gupta for the respondent

The judgment of the Court was delivered by—

MALIK, C J —These are four Government appeals against the orders of acquittal passed in four cases for prosecution under the United Provinces Prevention of Adulteration Act Act no VI of 1912

It would be convenient to take up the three cases Criminal Appeal no 143 of 1951 Criminal Appeal no 144 of 1951 and Criminal Appeal no 146 of 1951 together and Criminal Appeal no 420 of 1951 separately In Criminal Appeal no 143 of 1951 and Criminal Appeal no 146 of 1951 the accused Balmakund and Amar Nath respectively were charged with having sold adulterated Lahi oil while in Criminal Appeal no 144 of 1951 Amar Nath was prosecuted for having sold adulterated Alsi oil

The accused are wholesale dealers The Sanitary Inspector suspected that the Lahi and Alsi oils sold by the accused were adulterated and he thereupon went and purchased some quantity of oils These he sent to the Public Analyst U P Government for analysis and report The Analyst found that the samples sent were all adulterated and thereupon the accused were prosecuted before Sri R D Pande Additional Magistrate first class Nini Tal The learned Magistrate tried the cases summarily and acquitted the accused on the ground that the accused were protected by section 6 of the Act It is against these orders of acquittal passed by the learned Magistrate that these appeals have been filed It has been urged on behalf of the State that the view taken by the learned Magistrate that the accused were entitled to rely on section 6 was erroneous

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STATE
v
BALMUKAND
Mehta C J

Section 4 of the Act provides that—

> Whoever sells to the prejudice of the purchaser any article of food or any drug which is not of the nature substance or quality of the article or drug demanded by such purchaser or sells or offers or exposes for sale any article of food or any drug which is not of the nature substance or quality which it purports to be shall be punished for the first offence with fine which may extend to two hundred rupees and for a second or any subsequent offence with fine which may extend to one thousand rupees or imprisonment of either description not exceeding three months or both

It is not necessary to quote the proviso The case for the prosecution was that the accused sold or offered or exposed for sale an article of food which was not of the nature substance or quality which it purported to be

The fact that the Alsi oil and the Lahi oil were adulterated has been found by the Public Analyst on an analysis of the samples sent to him and the learned counsel for the accused have not challenged the Analyst s report It has however been urged on behalf of the accused that the accused had offered for sale only such article as had been supplied to them from the mills that were manufacturing it not knowing that the articles were adulterated In other words the plea is a plea of want of *mens rea*, or that the articles were sold in good faith by the accused believing them to be un adulterated articles It is, however open to the Legislature to enact that sale of adulterated foodstuffs would *per se* be punishable Section 6 of the Prevention of Adulteration Act provides that

> In any prosecution under section 4 it shall be no defence to allege that the vendor was ignorant

of the nature substance or quality of the article or drug sold by him, or that the purchaser having bought only for analysis was not prejudiced by the sale

There is however a proviso to the section and if the vendor can come under the proviso he must be held to be not guilty The proviso makes it clear that the vendor must have taken from the person who supplied him with the article a written warranty to the effect that the articles sold were of the nature substance or quality which they purported to be that the vendor had no reason to believe at the time when the articles were sold that the articles were adulterated and lastly that the adulteration was not done when the articles were in his possession In the case before us the accused were able to prove the second and the third requirements that is that they sold in good faith what they had been supplied by the mills and had no reason to think that the Alsi oil or Lahi oil were adulterated The learned Magistrate also believed their statements that they sold the Alsi oil and Lahi oil in the same state in which the accused had purchased them It was admitted by the Sanitary Inspector that he purchased the samples from sealed tins

The only question was whether the accused had also obtained a written warranty to the effect that the Alsi oil and the Lahi oil were not adulterated The learned Magistrate thought that the invoices of purchase which were in writing and were on the record went to satisfy the first requirement We are not satisfied that the invoice of purchase in which the mills selling the articles to the accused had mentioned what they were selling was the type of written warranty which the Legislature had contemplated under proviso (*a*) to section 6 It is in public interest that the vendors of articles of food should sell to the public unadulterated

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v.
BADRI KANI

foodstuffs and it is with that object that this Act was passed Generally it is not the manufacturer who directly comes into the market to sell his articles to he consumer but there are many middle men who intervene It would be easy in such cases for the shop keepers to evade responsibility by pleading that they did not know that the article of food purchased by them for sale was adulterated It is on that account that the section has provided that ignorance of the fact of adulteration will be no excuse and the vendor will only be protected if apart from other things he had obtained a written warranty as regards quality from the person from whom he had purchased the articles for sale An invoice is merely a description of the articles sold and cannot be said to be a warranty given in accordance with the provisions of proviso *(a)* to section 6

Learned counsel has urged that Alsi oil is not edible and as regards Lahi oil his argument is that there is no evidence to show that it is edible Learned counsel has however admitted that Lahi is a type of black mustard seed which is more pungent than the ordinary mustard seed and is used by people who prefer more pungent oil than ordinary mustard oil We think we can take judicial notice of the fact that mustard oil is edible at least in this State As regards Alsi oil learned counsel said that Alsi oil is the same thing as linseed oil The question is whether linseed oil is an article of food under section 4 of the Act Food' has been defined in section 2 as including

> every article used for food or drink by man other than drugs or water and all material used or admixed in the composition or preparation of such article and shall also include flavouring matters and condiments '

The definition therefore is very general and any article used for food or drink by man would come under this section The matter came up before a learned single Judge of this Court in *Kamla Kant Misra* v *State* (1) and the learned Judge held that linseed oil was an article of food We see no reason to differ from that conclusion

In our view therefore the learned Magistrate erred in relying on the proviso to section 6 and acquitting the accused

As regards the fourth case (Criminal Appeal no 420 of 1951) in which Purna Nand was acquitted a sample of vegetable ghee Swastika Trade Brand, was taken from him by the Sanitary Inspector The sample was sent to the Public Analyst who reported that the sample was adulterated and sesame oil in the sample was less than the required minimum of 5 per cent As regards adulteration no questions were asked to the accused but he was asked whether it was not a fact that the Swastika Trade Mark vegetable ghee, the sample of which was sent to the Public Analyst contained less than 5 per cent of sesame oil The accused admitted that the sample was taken from his sealed tin and pleaded that he was innocent We take it that the Swastika Trade Mark is a registered trade mark under the Patents Designs Act Learned counsel for the State has admitted that there is no rule or regulation made by the State Government under section 14 of the Prevention of Adulteration Act requiring that all vegetable ghee should contain at least 5 per cent of sesame oil Section 5A of the Act therefore does not apply to the case and unless it can be shown that there is a rule or regulation under this Act which requires that the vegetable ghee should contain sesame oil in a certain proportion we fail to see how the accused can be convicted

(1) A I R 1951 All 596

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under section 4 of the Act. We are not satisfied that the case against Purna Nand has been made out beyond all doubt.

The result, therefore, is that Criminal Appeals nos. 143, 144 and 146 of 1951 are allowed. The accused are convicted under section 4 of the United Provinces Prevention of Adulteration Act and sentenced to pay a fine of Rs. 10 each.

Criminal Appeal no. 420 of 1951 is dismissed.

Order accordingly.

CRIMINAL MISCELLANEOUS

Before Mr. Justice Sapru and Mr. Justice Bhargava.

STATE OF UTTAR PRADESH

1953 *September 22*

v.

SHYAM SUNDER LAL JAIN

Contempt of Courts Act, 1926, *s. 2—Complaint filed by a complainant—case tried by a Magistrate first class—Accused acquitted—No revision filed—Letter or representation made by complainant to the Prime Minister of India—Letter, if amounts to contempt.*

On a complaint filed by S, a Magistrate of the first class tried the case against an accused under s. 500, Indian Penal Code and acquitted him. S did not file any revision but wrote a letter to the Prime Minister of India in the form of a petition or representation in which serious allegations of corruption and partiality were made against the Magistrate. This letter was ultimately forwarded to the District Magistrate who neither called S to substantiate his allegations nor held any enquiry but referred it to the Legal Remembrancer to Government for initiating contempt proceedings against S.

Held, that the letter or representation made by S to the Prime Minister of India did not amount in law to scandalizing

the court as it was no general publication and caused no embarrassment in the mind of the Magistrate

Brahma Prakash Sharma v *State of Uttar Pradesh* (1) relied upon

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STATE OF UTTAR PRADESH v SHYAM SUNDER LAL JAIN

Criminal Miscellaneous no 10 of 1950

The facts appear in the judgment

The Government Advocate ( ) for the State

Shambhu Prasad and *Jagdish Swarup* for the opposite party

The judgment of the Court was delivered by—

SAPRU, J —This contempt matter was referred by us to a Full Bench of five Judges as, in our opinion there was a conflict between two cases namely the Full Bench case of *State* v *Brahma Prakash* (2) and the Bench case of *Rex* v *B S Nayyar* (3) Before the proposed Full Bench could dispose of the case the Supreme Court gave its decision in *Brahma Prakash Sharma* v *The State of Uttar Pradesh* (1) In view of the fact that the point referred to the Full Bench has been considered and decided by the Supreme Court the learned CHIEF JUSTICE has returned the reference to this Bench with the query whether it is any longer necessary to constitute a Full Bench We have heard learned counsel for the parties and are clearly of the opinion that it is not necessary to constitute a Full Bench in view of the decision of the Supreme Court

We shall now proceed to give the salient facts of this case Sri Shyam Sunder Lal Jain Sarraf the opposite party was the complainant in a case under section 500, Indian Penal Code It was numbered as 20 of 1949 and came to be tried by Sri H L Mehra a Magistrate of the first class Dehra Dun The learned Magistrate came to the conclusion that the complainant had not

(1) 1953 S C J 521 (2) I L R [1952] All 181

(3) I L R 1950 All 310

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STATE OF UTTAR PRADESH v. SHYAM SUNDER LAL JAIN

Sapru J.

been able to establish the case against the accused and by his order dated the 3rd August 1949 acquitted the accused on the ground that they were protected by Exception 9 to section 499 of the Indian Penal Code. The opposite party took no further action by way of revision so far as this matter was concerned. He however, wrote a letter to the Prime Minister of India. It is in the form of a petition or representation and is dated the 10th January 1950. In the course of this letter the opposite party made serious allegations of corruption and partiality against the Magistrate.

The representation sent to the Prime Minister was forwarded by the Prime Minister's Private Secretary to the Chief Secretary to the Government of Uttar Pradesh, Lucknow, for disposal. The Chief Secretary passed on that letter to the Petitions Officer of Government, U. P., for necessary enquiry and final disposal. On an enquiry by a letter dated the 12th March 1950 by the Petitions Officer the opposite party reiterated the allegations of dishonesty and partiality that he had made against the Magistrate. He pointed out that the letter was not intended to interfere with the course of justice but was sent in order that an enquiry might be made into the conduct of the learned Magistrate who he alleged had been corrupt. The Petitions Officer forwarded the petition as also the letter dated the 26th March 1950 to the District Magistrate of Dehra Dun for necessary action. The District Magistrate of Dehra Dun did not call upon the opposite party to substantiate his allegations. He in fact, did not hold any enquiry but took the view that the letter constituted a contempt of court and referred it to the Legal Remembrancer to Government. Thereafter this Court was moved to initiate contempt proceedings and notice was issued by the Vacation Judge on the 6th June, 1950 to the opposite party to show cause why he should not be committed

for contempt The opposite party has now appeared and filed a counter affidavit The question before us is whether he is, in all the circumstances of this case guilty of contempt

The first thing to note is that the representation which is the basis of the charge of contempt was made by the opposite party in the form of a petition to the Prime Minister of India There was, in this case no general publication The representation was sent in a registered cover to the Prime Minister The letter or representation was sent by the Prime Minister's office to the Chief Secretary and thereafter it went to the District Magistrate The basis of the present proceedings is therefore the letter to the Prime Minister Now we are not in a position on the material before us to say whether the letter or representation was necessarily of a *mala fide* nature The position in this case appears to us to be that no enquiry of any sort was made by the District Magistrate before he decided to refer the matter to the Legal Remembrancer for contempt proceedings against the opposite party It may be further pointed out that the letter or representation cannot and could not amount in law to scandalizing the court as it did not comply with the requirements for such contempt laid down by the Supreme Court in the case of *Brahma Prakash Sharma* v. *The State of Uttar Pradesh* (1) After distinguishing between a wrong done to a judge personally and a wrong done to the public and after pointing out that it is the latter which can properly be made the subject matter of a contempt proceeding his Lordship Mr Justice MUKHERJEE who delivered the judgment of the Supreme Court goes on to observe that

> It will be an injury to the public if it tends to create an apprehension in the minds of the people

(1) 1953 S C J 521

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STATE OF UTTAR PRADESH v. SITAM SUNDER LAL JAIN

Sapru J.

regarding the integrity, ability or fairness of the Judge or to deter actual and prospective litigants from placing complete reliance upon the court's administration of justice, or if it is likely to cause embarrassment in the mind of the Judge himself in the discharge of his judicial duties

Now there can be no question of causing embarrassment in the mind of the Judge himself as the representation was sent after the disposal of the case There was no case pending before the learned Magistrate or before any other court at the time the representation was sent to the Prime Minister The letter was sent to a person who the opposite party thought was the appropriate authority Actually the Prime Minister was not the proper authority to be addressed Anyway there was here no publication to the public or any section of the public The letter was in the form of a confidential letter It was sent per registered post Now, there may have been publication so far as the representation is concerned from the point of view of the law of libel The letter is *prima facie* of a libellous character and the Magistrate whom it seeks to defame has a remedy by way of a libel suit or a criminal action for defamation against the opposite party The question however is whether the opposite party can be held to be guilty of contempt on the ground that by so doing he has scandalized the court or brought the administration of justice into discredit or contempt A letter sent to the Prime Minister and not intended to be broadcast to the public or any section of the public cannot create an apprehension in the minds of the people to use the language of Mr Justice MUKHERJEE, regarding the integrity ability or fairness of the Judge Further it could not deter actual and prospective litigants from placing complete reliance upon the court's administration of justice for the obvious reason that they would know

nothing about it it not having been published to them It may be remarked that again to use the language of Mr Justice MUKHERJEE, the object of contempt proceedings is not to afford protection to Judges personally from imputations to which they may be exposed as individuals It is rather intended as a protection to the public whose interests would be very much affected if by the act or conduct of any party the authority of the court is lowered and the sense of confidence which people have in the administration of justice by it is weakened

It is well known that the contempt jurisdiction is a summary jurisdiction This jurisdiction should be exercised as is observed by Lord RUSSELL L C J with scrupulous care and only when the case is clear and beyond reasonable doubt [vide *R* v *Gray* (1)] This Court is reluctant to use this weapon except in order to maintain the dignity of the courts and to uphold the majesty of the law It may be emphasized that the Supreme Court view as we read it, is that courts should be reluctant to take notice of technical contempt of court There must be something to show that the contempt was likely to interfere with the due administration of justice or undermine the confidence which the public rightly reposes in courts of law as courts of justice In this particular case, while the attack on the Magistrate is of a vile character, these particular tests are not satisfied For these reasons we do not think that the remedy of contempt is the appropriate remedy for the Magistrate We have come to the conclusion that in all the circumstances of the case it is not desirable to award costs to the applicant

The application is dismissed but without any order as to costs and the notice is discharged

Order accordingly

(1) L R [illegible]

CIVIL MISCELLANEOUS

Before the Honourable B Malik, Chief Justice and Mr Justice Bhargava

RAM SWARUP BANGALIMAL (APPLICANT)

1953
September
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v

COMMISSIONER OF INCOME TAX (OPPOSITE PARTY)

Indian Income Tax Act, 1922 *s* 66 (2)—*Closing stock valued by assessee at market rate—Stock valued by assessee at cost price in previous years—Whether assessee entitled to value his stock at market rate*

The assessee a firm carrying on wholesale cloth business showed a total turn-over of Rs 12 81 370 The receipts showed a balance of Rs 9 263 in favour of assessee After deducting expenses he showed a net loss of Rs 13 910 and in preparing the Profit and Loss Account he valued his closing stock at the market rate at Rs 1 64 191 The cost price of the said stock was Rs 2 27 913 The Income tax Officer the Appellate Commissioner and the Tribunal were of opinion that the assessee should have valued his closing stock at the cost price as he had been doing in previous years

Upon question referred

Held that it cannot be said that the assessee was not entitled to value his closing stock at market value because the Department could only show that the assessee had always valued his stock at cost price but there was nothing on the record from which it could be deduced that in those years the market price was less

Miscellaneous Case no 164 of 1948

The facts appear in the judgment

Jagdish Swarup for the applicant

B L Gupta for the opposite party

The judgment of the Court was delivered by—

MALIK, C. J.—The question referred to this Court for its decision in compliance with an order under section 66(2) of the Indian Income tax Act is

> Whether on the facts and in the circumstances of this case, the assessee was entitled to value his closing stock at market rate?

The assessee is a firm mainly carrying on wholesale cloth business. The accounts produced showed a total turn-over of Rs 12 81 375. The receipts showed a balance of Rs 9 263 in favour of the assessee. After deducting certain expenses the assessee however worked out a net loss of Rs 13,915. In preparing the Profit and Loss Account the assessee had valued his closing stock at the market rate at Rs 1 64 191. The cost price of the said stock was however Rs 2 27 913. The Income tax Officer was of the opinion that the assessee should have valued his closing stock at the cost price as he had been doing in previous years and he added back the difference between Rs 2 27 913 and Rs 1 64 191 i e Rs 63 722. The Appellate Assistant Commissioner and the Tribunal agreed with the decision of the Income tax Officer.

The assessee had pleaded that his usual method of accounting was that at the end of the year for the purpose of the preparation of his Profit and Loss Account he used to value the closing stock either at cost price or at market price whichever was lower and that he had followed the same practice in the year in question. He further pleaded that by reason of the textile control restrictions which came into force in June 1948 there was an appreciable fall in the market price and he could not expect any relaxation of the controls and the rise in price to recover what he had paid for the stock.

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RAM SWARUP BANSILAL v. COMMISSIONER OF INCOME-TAX

Mahajan C.J.

The Appellate Tribunal held and it is also stated in the statement of the case that the assessee had failed to prove that he had always valued the closing stock at the lower of the two prices the cost price and the market price It is stated in the statement of the case that the method followed in preparing the Profit and Loss Account by the assessee was that he valued his stock at cost price and in the year in question there had been a departure from the method of valuation followed in the previous years

We may mention that though the assessee may not have succeeded in proving his case that he had valued his closing stock at the lower of the two figures the cost price and the market price the Department has not established that in any year the assessee had valued his stock at cost price though the market price might have been lower The burden of proving that there has been a change in the method of accounting was on the Department and in the absence of any evidence that the assessee had in any year valued his stock at cost price even though the market price might have been lower it cannot be said that the method of accounting followed by the assessee was to value his stock at cost price even though the market price might have been less

We are asked to answer the question whether the assessee was entitled to value the closing stock at market rate when in the previous years he had been valuing it at cost price

In *Whimster & Co v Commissioners of Inland Revenue* (1) it was laid down that in preparing profits and gains for the purposes of income tax two principles must be kept in mind In the first place the profits of any particular year of accounting must be taken to consist of the difference between the receipts from the

(1) 12 Tax Cases 813 823

trade or business during such an accounting period and the expenditure laid out to earn those receipts In the second place the account of profit and loss to be made up for the purpose of ascertaining that difference must be framed consistently with the ordinary principles of commercial accounting so far as applicable and in conformity with the rules of the Income Tax Act or of that Act as modified by the provisions and schedules of the Acts regulating Excess Profits Duty as the case may be

No correct picture of the profits and loss account can be had unless the opening and the closing stocks are also taken into account Two principles have now become well settled (1) that the assessee is entitled to value the closing stock either at cost price or market value whichever is lower and (2) that the value of closing stock must be the value of opening stock in the succeeding year that is an assessee cannot close his accounts and value his stock at a particular figure and the next morning on the first day of the next year he cannot value it at a different figure In Halsbury's Laws of England Hailsham Edition Volume 17, page 124 paragraph 232 is as follows

> "It is to be observed that the allowance by the Inland Revenue authorities of a writing down of stock when market value is lower than cost is in effect the allowance of a reserve for a future unrealized loss and as such is an exception to the general rule that precautionary reserves are not allowable

In *Inland Revenue Commissioners* v *Cock, Russell & Co Limited* (1) it was held that in valuing stock in trade for the purpose of ascertaining the profits of a business for revenue purposes it is proper to consider each item of stock separately and to take it at cost or value it at

(1) 6 T L R 725

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RAM SWARUP BANGALI MAL v. COMMISSIONER OF INCOME TAX

Malik C J

market value whichever is the lower CLAYSON L J in *B G Utting & Co, Ltd v Hughes (H M Inspector of Taxes)* (1) said—

> The normal method of dealing with this item would be to make it up by calculating cost or market value whichever is the lower of the various items represented

In Spicer and Pegler's Practical Auditing Sixth Edition, page 170, basis of valuation of stock is laid down as follows

> Stock should be valued at cost or market price whichever is lower at the date of the balance sheet
>
> In this connexion the term market value means either the replacement value or the selling value whichever is the lower
>
> In no case should the value be higher than cost even though the market value has risen, as this would result in taking profit before the sale is effected and the profit earned On the other hand a fall in the market value, due to a fluctuation in the price, need not be considered if the value has since risen A permanent fall in value however must be taken, into account
>
> Stock is a floating asset, and as such must be brought into account at its realizable value when that value is lower than cost

The reason for this has been given by COUTTS TROTTER Chief Justice in *Commissioner of Income tax, Madras v Chengalvaraya Chetty* (2) to enable a trader more evenly to distribute his loss The learned CHIEF JUSTICE observed

> I would add that the accepted rule is that the assessee in crediting the closing stock figure is to

(1) 33 Tax Cases 174 185 (2) I T C 14 18

take either the cost price or the market value whichever be the less a provision obviously intended to be in favour of the trader and enables him more evenly to distribute his loss

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Malik C J

The learned Chief Justice RAJAMANNAR J in *Commissioner of Income tax and Excess Profits Tax Madras v Messrs Chari and Ram Madura* (1) has said

> The accepted basis of valuation of stock is cost or market value whichever is lower at the date to which the accounts for a period are made up

As regards the reason for the rule the learned CHIEF JUSTICE has observed as follows

> If one can speculate on the rationale of the rule which allows an assessee to adopt the market value when it is lower than the cost it appears to be this If one were to imagine a sale taking place on the closing day of the entire stock it is reasonable to expect that the articles of which the market value is lower would not fetch anything more than at those rates and therefore loss would be certain But there would be no assurance that there would be a market for the entire stock of articles of which the market value is higher and therefore it would be hazardous to assume that the entire stock could be sold at the prevailing market rate and necessarily bring in a profit

Whatever may be the reason for the rule it is now well settled that while the Income tax Department is not entitled to anticipate profits and compute such anticipated profits as income the trader has been given a concession not by any statute but by the general practice of accountancy to value his closing stock at cost or market value whichever is lower so that he may be able to spread out his loss

(1) (1949) 17 ITR 1

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PERSHADI SANGARI MAL
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In the case before us on behalf of the Commissioner of Income tax reliance is placed on the fact that the assessee has not claimed that he made a change in the method of accounting and his plea that he had always been valuing the stock at market price or cost price whichever was lower has not been found to be true. On behalf of the Commissioner of Income tax reliance is also placed on the fact that the assessee had always been valuing his stock at cost price and it is said that he is bound by the method of accounting regularly followed by him and as he has not even alleged that he had made a change in the method of accounting there is no reason to give him any relief.

Section 13 of the Indian Income tax Act makes it clear that the Income tax authorities are bound to accept the method of accounting regularly employed by the assessee for computation of his income unless the method employed by him is such that in the opinion of the Income tax Officer the income profits and gains cannot properly be deduced therefrom. In that case the Income tax Officer has been given the right to make the computation on such basis and in such manner as he may determine. Section 13 of the Income Tax Act is as follows:—

> *Method of accounting*—Income profits and gains shall be computed for the purposes of sections 10 and 12 in accordance with the method of accounting regularly employed by the assessee:
>
> Provided that if no method of accounting has been regularly employed or if the method employed is such that in the opinion of the Income tax Officer the income profits and gains cannot properly be deducted therefrom then the computation shall be made upon such basis and in such manner as the Income tax Officer may determine.

As regards the assessee's right to change the method learned counsel for the Commissioner of Income tax has urged that though the assessee may have the right to change the method of accounting adopted by him one method of accounting can be replaced only by another regular method of accounting In *Messrs Ram Kumar Kedarnath v The Commissioner of Income tax, Bombay* (1) BEAUMONT, Chief Justice, said

> Although I think it is open to an assessee to change the regular basis on which he keeps accounts still if he seeks to do that he must satisfy the Commissioner on proper evidence that he has in fact changed the regular basis of accounting I do not think here he did in fact change the regular basis of accounting except for this particular half year and if the company had been reinstated again and had continued the agency agreement as before there is nothing to show that the basis on which the accounts had been kept in the past would not have been continued in future '

On behalf of the Commissioner of Income tax it is therefore urged that unless it is established that the assessee has now adopted a regular method of accounting of valuing his stock at market price or cost price whichever is less he should not be allowed to value the closing stock at the market price which was lower in the accounting year in question Reliance is placed on the observations of their Lordships of the Judicial Committee in *Commissioner of Income tax, Bombay Presidency v Ahmedabad New Cotton Mills Company Limited* (2), that

> The one thing that is essential is that there should be a definite method of valuation adopted which should be carried through from year to year so that in case of any deviation from strict

(1) 5 I T R 261 (2) (1929 30) L R 57 I A 21

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Malik C.J.

market value in the entry of the stock at the close of one year it will be rectified by the accounts in the next year."

We were at one time inclined to the view that the words "method of accounting" in this section do not relate to the question of the valuation of the closing stock but mean whether the assessee had been keeping his account on cash basis or on mercantile basis or had followed the hybrid system of accounting that is partly mercantile and partly cash. In view, however, of the observations made by their Lordships of the Judicial Committee in *Commissioner of Income tax, Bombay Presidency v. Ahmedabad New Cotton Mills Company, Limited* (1) referred to above and *Commissioner of Income tax, Bombay v. Sarangpur Cotton Manufacturing Co. Ltd. Ahmedabad* (2), we must hold that how the closing stock was to be valued must also be deemed to be part of the method of accounting.

We have already said that it has been found that the assessee had all along been valuing his stock at cost price. It has not been shown on behalf of the Department that in any year the market price was less than the cost price. It cannot therefore be said that the assessee was following the method of valuing his stock at cost price even though the market price might have been less. Under the well recognized system of accountancy the assessee had the right to value his closing stock at market price or cost price whichever was less and in the absence of a proof or finding that the assessee had been regularly valuing his stock at cost price even though the market price might have been less or in the absence of evidence that in any year the market price was less than the cost price, it cannot be said that he has made a change in the method of accounting. No doubt the assessee has not substantiated his plea

(1) (1929-30) L.R. 57 I.A. 84. (2) (1957) S.C.R. 1 (S.C.) 21.

that he had always been valuing his stock at cost price or market price whichever was less but the Income tax Officer was entitled to add back the sum of Rs 6,7,722 to the income shown by the assessee only if he could arrive at a definite finding that there had been a change in the regular method of accounting employed by the assessee and the burden of proving that there had been such a change was clearly on the department In the statement of the case the Tribunal has said that on the record there was no evidence produced by the assessee to prove that he had valued his opening and closing stocks in earlier years at cost simply because in all those years the cost price was lower than the market price Learned counsel for the Department had however to admit that the only fact known was that the assessee had always valued his stock at cost price but there was nothing on the record from which it could be deduced that in those years the market price was less In the circumstances it does not appear to be possible to draw an inference that the assessee had adopted the regular method of valuing his stock at cost price even if the market price was lower and, consequently in valuing his stocks in the accounting year in question at the lower market price it cannot be said that the assessee was changing the regular method of accounting employed by him in he past It cannot therefore be held that the assessee was not entitled to value his closing stock at market rate This is our answer to the question referred to us for decision

We do not think that this is a case in which the assessee should get his costs as the plea taken by him that he had always been valuing his stock at cost or market price whichever was lower had been rejected by the Tribunal and no reference was asked for specifically on that point

Question answered

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CIT
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APPELLATE CIVIL

Before Mr Justice Mootham and Mr Justice Sapru

KISHAN (DEFENDANT)

v

DR COLONEL NAWAB HAFIZ SIR MOHAMMAD AHMAD SAID KHAN (PLAINTIFF)

Decd
October 21

United Provinces Tenancy Act, 1939, s 91—*Weaving work carried on by a* riyaya *in a* gaha *inside his house—Proprietor of the village whether, entitled to claim for it Parjaut —Payment if in the nature of a cess*

H the proprietor of a village filed a suit to recover from *K* a weaver and a Koli by caste a sum of Rs 3 as *parjaut* for three years on the allegations that *K* was carrying on weaving work in a *gaha* or a loom inside his house and that according to the custom recorded in *wajib ul arz H* was entitled to claim a sum of Re 1 per year as *parjaut* for the use of land on which *gaha* existed

The defence was that *K* was a *riyaya* and had been carrying on weaving business in his residential house since long and that the *riyayas* in the village pay no rent for their houses

Held that the payment was not on the facts established in the nature of a compensation for land but for carrying on the work of a weaver s profession inside his house and thus was not recoverable from *K*

Allah Dia v *Akhtar Ali* (1) referred to

Letters Patent Appeal no 42 of 1945 from a decision of J R W BENNET J dated the 22nd April, 1945 in Second Appeal no 97 of 1944

The facts appear in the judgment

Bhagwan Das Gupta, for the appellant

M H Beg for the respondent

(1) 1943 A L J 58

The judgment of the Court was delivered by—

SAPRU, J.—This appeal is directed against the judgment and decree dated the 22nd March, 1945 of a learned single Judge of this Court.

The facts which have given rise to this appeal may be stated shortly. The plaintiff respondent is the proprietor of a village of which the defendant is a resident. The defendant appellant is a weaver being a Koli by caste. The plaintiff respondent's case was that he was entitled to recover from the defendant appellant a sum of Rs.3 as *panjaut* for a period of three years. The case as put forward by the plaintiff respondent was that the defendant appellant being a Koli by caste, was carrying on weaving work in the village that in connexion with that work there exists a *garha* or a loom inside his house and that in accordance with the custom as recorded in the *wajib ul arz* the plaintiff respondent was entitled to claim a sum of Re.1 a year as *panjaut* for the use of the land on which the *garha* exists.

The suit was resisted by the defendant appellant on the ground that he was a *riyaya* from the time of his ancestors that he had been carrying on weaving business in his residential house that the *riyayas* in the village pay no rent for their houses and that he was not liable to pay any ground rent the charge claimed being in the nature of a cess.

The learned Munsif decreed the plaintiff respondent's claim holding that the defendant appellant was liable to pay it as ground rent the charge being not a cess or a tax on profession. Aggrieved by the judgment and decree of the learned Munsif the defendant appellant went in appeal to the lower appellate court. The view taken by the learned Additional Civil Judge was different from that which had

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HAMMAD
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KHAN

Sapru J.

appealed to the learned Munsif. He came to the conclusion that the plaintiff respondent was not entitled to the relief claimed by him as the sum claimed was in the nature of a cess which could not be levied by any Zamindar in view of the provisions of section 91 of the United Provinces Tenancy Act, the Provincial Government not having sanctioned its collection under that section. The learned single judge who heard the appeal did not find himself in agreement with the learned Additional Civil Judge. He allowed the appeal, reversed the decree of the lower appellate court and decreed the plaintiff respondent's suit. As the question was an important one, he gave the defendant appellant leave to appeal under the Letters Patent as it was then called.

The question for consideration is whether the amount in dispute was in the nature of a cess and was therefore in view of the provisions of section 91 of the United Provinces Tenancy Act not recoverable from the defendant appellant. From the *nazri ul arz* it would appear that no rent is payable by *ryots* for their houses in the *abadi*. It however states that a Koli i.e. a weaver is liable to pay Re 1 annually as *panjaut* for each *garha* i.e. loom, used by him. This *garha* has been found by the learned Additional Civil Judge to be inside the defendant appellant's house. From the evidence of Kamta Prasad general attorney of the plaintiff it is clear that this amount was annually chargeable only from those Kolis who did weaving work. It was dependent upon their doing weaving work. If no weaving work was done it was not charged at all. On these facts the learned Additional Civil Judge came to the finding that the amount levied was not in the nature of a rent for land but a tax on profession. Being a tax on profession he looked upon it as a cess and held

that the suit was barred by section 91 of the United Provinces Tenancy Act.

There can be no doubt that the *wajib ul arz* furnishes *prima facie* evidence as held in the Full Bench case of this Court *Allah Dia* v. *Akhtar Ali* (1), that the charge is in the nature of what is described in it, i.e. a *parjaut* or something in the nature of a ground rent. The learned single Judge has however taken the view that where a site in the village *abadi* is occupied by a *rot* for the purpose of a profession other than that of agriculture he is liable to pay some due to the zamindar which is not a cess provided such payment is warranted by the *wajib ul arz* and that this due is not house rent. It is in the nature of a ground rent for utilizing the site for the purpose of his profession. The matter, however, is capable of being looked at from a different angle. It is conceded by learned counsel for the plaintiff respondent that if it cannot be looked upon as a ground rent it is not a legal charge. Whatever be the description of the charge in the *wajib ul arz*, we fail to understand how in the face of the clear findings in this case that the charge is levied only for weaving work done inside the house it can be looked upon as analogous to *parjaut* or ground rent. It is clear that it is only chargeable from those Kohs who actually weave. If they do not weave they would not be charged at all. Section 91 of the United Provinces Tenancy Act is in the following terms:—

> Notwithstanding that a cess had been recorded under the provisions of section 56 or section 86 of the United Provinces Land Revenue Act, 1901, no cess which is levied in accordance with village custom, other than a payment in kind which forms part of the rent payable for a holding shall after such date as may be notified by the Provincial

(1) 1950 A.L.J. 3.

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KISHAN v. DR. COLONEL NAWAB HAZRAT MOHAMMAD AMIR SAID KHAN

Sup. J.

Government in the official *Gazette*, be recoverable in any civil or revenue court unless such cess is sanctioned under the provisions of sub section (2)."

In interpreting this section it must be remembered that no suit can lie for the recovery of any cess which is levied in accordance with village custom unless it is sanctioned by the provisions of sub section (2) of section 91. Sub section (2) authorizes the Provincial Government to sanction the collection of any cess levied on account of any bazar or fair and impose on the collection of such cess any such condition regarding conservancy, police or other establishments as it thinks fit. Obviously the levy in this case is not of the character contemplated by sub section (2). The object of the legislature in enacting this section appears to have been to curtail the right of the zamindar to levy customary dues or services of a vague and uncertain nature.

The levy is in the nature of a cess or tax prohibited by law. Reference on this part of the case may be made to *Sri Kalyanraiji v. Mofassil Company Ltd.* (1). In that case the question was whether the Managing Proprietor of the temple in Broach was entitled to a lago or perquisite, or tax of two annas per bale on all cotton brought in and exported from Broach, inasmuch as Act XIX of 1844 had abolished all taxes and cesses of every kind on trades and professions under whatsoever name levied within the Presidency of Bombay, and not forming part of the land revenue. It was held by their Lordships of the Privy Council of the Judicial Committee that the tax was in the nature of a cess not leviable by the Managing Proprietor of the temple. On the analogy of that case we think it correct to hold that the payment was not on the facts established in this case in the nature of a compensa-

(1) (1889) I.L.R. 14 Bom. 527

tion for land but for carrying on the work of the profession of a weaver inside the defendant appellant's house and as such not leviable.

It may be mentioned that according to the view taken by the Full Bench in the case of *Allah Dia* v. *Akhtar Ali* (1) the question whether a particular demand is a cess or ground rent has to be determined on the circumstances and evidence of each case, though the name by which the demand is generally known and is recorded in the *wajib ul arz* furnishes *prima facie* evidence of the purpose for which the demand is levied and is helpful in determining the true nature of the demand. We have shown that in this case, having regard to all the surrounding circumstances and evidence, the levy was in the nature of a cess.

The result is that we allow this appeal, set aside the judgment and decree of the learned single Judge and restore that of the lower appellate court. In the circumstances of the case we make no order as to costs.

Appeal allowed.

(1) 1943 A.L.J. 586.

CIVIL MISCELLANEOUS

Before Mr. Justice Mootham and Mr. Justice Sapru

MOHAMMAD YASIN (APPLICANT)

v.

1953
November
18

THE DISTRICT MAGISTRATE, KANPUR AND ANOTHER (OPPOSITE PARTIES)

Constitution of India *Arts. 226, 19 (1) (g)—Licence of a petition writer cancelled after expiry—Whether, provisions of Art. 19 (1) (g) contravened.*

Where the licence of a petition writer issued by the Collector of *K* permitting him to exercise his profession within the Collectorate compound was cancelled after holding an enquiry

Held that the petition writer has no legal remedy and there is no contravention of the provisions of Art. 19(1) (g) of the Constitution.

Civil Miscellaneous no. 873 of 1953.

The facts appear in the judgment.

Mirza Hamid Ullah Beg for the applicant.

The Standing Counsel for the opposite parties.

MOOTHAM, J.—This is a petition under Article 226 of the Constitution which in my opinion is misconceived. The petitioner is a petition writer who held a licence issued by the Collector of Kanpur which permitted him to exercise his profession within the Collectorate at Kanpur. For this licence the petitioner made a quarterly payment of five rupees. Suspicion arose earlier in the year that the petitioner had been responsible for the typing of an anonymous letter addressed to the District and Sessions Judge, Kanpur. An enquiry of some kind was held and on the 1st Septem

ber, 1953 the petitioner's licence as a petition writer was cancelled by an order which reads as follows

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Mooth m J

> The typing licence no 17 issued to Sri Mohammad Yasin a typist of the Collectorate Court compound Kanpur has been cancelled for a period of five years with effect from 26th August 1953 for having worked in an objectionable manner
>
> No application or papers written by him should be entertained in my court

The petitioner has come to this Court from which he seeks a writ in the nature of *certiorari* to quash this order of the 1st September He claims that he has a fundamental right to carry on his profession of petition writer in the Collectorate compound and that his licence can be cancelled only upon proof of the contravention of one of the conditions subject to which it was issued

Sri *Hamid Ullah Beg*, who has strenuously argued the case for the petitioner has however been wholly unable to satisfy me that the petitioner has any legal right let alone a fundamental right to carry on his profession or business in the Collectorate compound The petitioner's case is I think wholly distinguishable from that of a person who is required by law to obtain a licence as a condition of carrying on his business or profession at all Where the law lays down that a particular occupation cannot be carried on save under a licence then the withdrawal of a licence has the obvious consequences of wholly preventing the person concerned from carrying on that business and the question may very well arise whether there has been contravention of the provisions of Article 19 (1) (g) of the Constitution That appears to me very far from

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the position in the present case in which it is not in dispute that the petitioner is free to carry on his occupation in any place other than in the Collectorate. The petitioner has, in my opinion, no right to carry on his business in the Collectorate compound save with the permission of the Collector and if that permission is withdrawn the petitioner may have a grievance but I cannot see that he has any legal remedy unless it can be founded on breach of contract. The remedy for breach of contract is of course by way of suit. The petitioner must satisfy this Court that he has a legal right and that there has been an infringement of that right, this in my opinion he has failed to do.

The order of the 1st September contains however, one provision which though no objection to it has been taken in the petition and no argument has been addressed to us on it on behalf of the petitioner cannot, it is conceded, be sustained. I refer to the provision that "No application or papers written by him should be entertained in any court." Although no doubt intended to be effective only within the Collectorate this provision is clearly one which is in excess of the powers of the officer making the order, and the learned Standing Counsel has very properly given the court an undertaking that this sentence will be deleted from the order.

The petition must be dismissed but in the circumstances I would make no order as to costs.

SAPRU, J.—I concur. The petitioner was the holder of a licence for working as a steno typist petition writer in the court compound Collectorate Kanpur. His licence was cancelled by the Officer in charge Nazarat Collectorate Kanpur. We understand that this officer is the City Magistrate Kanpur. The order directs that the typing licence of the petitioner should be cancelled

for a period of five years and that no application or papers written by him should be entertained in any court The petitioner has come to this Court under Article 226 of the Constitution and the relief that he seeks is that of *certiorari* quashing the order of the 1st September 1953 Certain other consequential reliefs have also been claimed

Mr *Hamid Ullah Beg* who appears for the petitioner contends that the petitioner has a fundamental right under Article 19(g) to carry on his business trade or profession and that that right has been interfered with by the order in question I cannot understand how the petitioner can be said to have a fundamental right to carry on business in a place belonging to some other person and in this case the State The Collectorate compound is the property of the State Government and as far as I can see the proper person to look after it is the Collector The order cancelling the licence was passed by the City Magistrate as he was the officer deputed by the Collector to look after the Collectorate compound Before the petitioner can come to this Court for relief under Article 226 of the Constitution it is incumbent on him to show that he has a legal right and that there has been an infringement or that legal right In this case I can see no infringement of any legal right The petitioner has not been able to establish what legal right he had to the unrestricted use of the Collectorate compound for working as a petition writer There is no analogy between this case and that of a person who cannot carry on his profession, trade or business at all without a licence The cancellation of a licence in a case of that nature would deprive a person of the means of his livelihood In this case the cancellation of the licence involves no such consequences for it is still open to the petitioner to carry on his business elsewhere than in the

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Sapru J.

Collectorate compound No person has a right to carry on his profession business or trade in the premises of some other person and it strikes me therefore that the argument which has been advanced by Mr *Beg* has no force

Mr *Beg* contends that the petitioner has been deprived of his licence on grounds extraneous to those on which the licence had been granted to him He has invited our attention to those terms But here again it is well to remember that a licence can be revoked for misbehaviour [see on this point the cases of *Hurst v Picture Theatres Ltd* (1), *Arpan Ali v Jnanendra Kumar Pal Choudhury* (2) and *Dominion of India v R B Sohan Lal* (3)] Learned counsel for the petitioner has not been able to point out that the petitioner had any right under any statute or statutory rule to carry on business in the Collectorate compound For a contractual right or liability the remedy is not a petition under Article 226 but a regular suit No reason has been advanced why this Court should exercise its powers under Article 226 of the Constitution in favour of the applicant

There is however one aspect of the case which frankly I do not like The concluding part of the order of the City Magistrate is that no application or papers written by him (i e the petitioner) should be entertained in any court It may be that the City Magistrate had good reasons to be annoyed with the petitioner's behaviour But it must be remembered that we are not living in the days of Nadir Shah but in a State which is subject to the rule of law It was, in my opinion grossly improper on the part of the Magistrate to give expression to his feelings of annoyance by incorporating in his order something which

(1) L R [1915] 1 K B 1 (2) A I R 1945 Cal 413
(3) A I R 1950 Punj 40

he had clearly no right to incorporate It was not open to him to prevent the petitioner from earning his livelihood by typewriting in places other than the Collectorate compound The cancellation of the licence allowing him to work in the Collectorate compound for a period of five years for misbehaviour was in itself a severe punishment and I cannot understand how the City Magistrate thought that it was right or proper that he should go out of his way to pass an order which is highly unjudicial in tone and spirit Had it not been for the fact that the learned Standing Counsel has very properly given us an assurance that this part of the order will be expunged from the order I might have considered the question whether we should not interfere with part of the order passed by the City Magistrate The learned Standing Counsel has given us the assurance that this part of the order will be expunged and I have no doubt that the undertaking will be honoured

Having regard to the fact that the petitioner has not been able to make out a case for the infringement of any legal right there is no alternative for us but to dismiss the application But, in the circumstances of this case, I would make no order as to costs

Petition dismissed

APPELLATE CIVIL

Before the Honourable B Malik, Chief Justice and Mr Justice Sapru

MOHAN LAL AND OTHERS (CREDITORS)

1953
December
15

v

GOKARAN SINGH (JUDGMENT DEBTOR)

United Provinces Encumbered Estates Act, 1934, *ss 2(a) and 4— Debtor' — Its definition*

A debtor under the Encumbered Estates Act is a person who has any pecuniary liability which is not only a personal liability but also includes a liability recoverable only from his property

Letters Patent Appeal no 15 of 1950 from a decision of SETH, J dated the 5th August 1949 in Second Appeal From Order no 1 of 1948

The facts appear in the judgment

Baleshwari Prasad, for the appellants

Prem Mohan Verma, for the opposite party

The judgment of the Court was delivered by—

MALIK, C J —This is a Special Appeal against the decision of learned single Judge The facts of the case are that Bhola Singh and his son Hakim Singh had mortgaged certain properties to Mohan Lal and others in the year 1926 On the 1st of February 1932 Bhola Singh sold his half share in one of the villages to Subedar Singh A suit no 35 of 1932 was filed by Mohan Lal and others against the mortgagors but Subedar Singh was not impleaded The preliminary decree was passed on the 21st of April, 1932 and the final decree on the 4th of March 1933 In the year 1936 Bhola Singh and Hakim Singh applied under the Encumbered

Estates Act Mohan Lal and others claimed that they were creditors and they proved their debt On the 11th of March 1939, a decree under section 14 of the Encumbered Estates Act was passed in their favour against the landlord applicants In the year 1940 Subedar Singh sold the 8 biswansi share purchased by him in 1932 to Gokaran Singh This share had been included by Bhola Singh and Hakim Singh in the list of properties belonging to them Gokaran Singh filed an objection under section 11 of the Encumbered Estates Act in the year 1944 His objection was allowed and the 8 biswansi share was excluded from the list of properties belonging to the landlord applicants Mohan Lal and others then filed an application under section 9(5) (*a*) of the Encumbered Estates Act for apportionment of the debt on the ground that Gokaran Singh being in possession of a part of the mortgaged property was liable to pay a portion of the debt and the debt should therefore be apportioned between the landlord applicant and Gokaran Singh The trial court granted the application and held that Gokaran Singh was liable to pay Rs 741 Gokaran Singh filed an appeal and the learned District Judge allowed the appeal and set aside the order of the trial court on the ground that Gokaran Singh was not a joint debtor On a further appeal to this Court the learned Judge affirmed the decision of the lower court and dismissed the appeal but for different reasons

The learned Judge however gave leave to file a special appeal and this appeal has been filed against his decision The appeal was rightly dismissed by the learned single Judge though in our view the appeal should have been dismissed for reasons other than those given by the learned single Judge The learned Judge was of the opinion that a debtor under the Encumbered Estates Act was a person who was personally liable for the payment of a debt and the apportionment of a debt could, there

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fore, be made only between co debtors personally liable for payment The learned Judge relied on the first part of section 4 of the Encumbered Estates Act in support of the proposition Relevant portion of section 4 is as follows

> At any time within one year after the date on which this chapter (chapter III) comes into force any landlord who is subject to or whose immovable property or any part thereof is encumbered with private debts

The learned Judge from this deduced that a landlord is subject to a debt for which there is personal liability and if however there is no personal liability he is not subject to the debt and the debt is only recoverable from the property

We do not think that this reasoning was with great respect to the learned Judge sound All that the section means is that the landlord should be liable for secured or unsecured debts before he can apply under the Encumbered Estates Act Even a debtor who is not personally liable but whose property is liable to be taken in satisfaction of his debts can apply under the Encumbered Estates Act The word debtor has not been defined but debt includes [see section 2(*a*) Encumbered Estates Act] any pecuniary liability except a liability for unliquidated damages A debtor therefore, is a person who has any pecuniary liability it does not mean that the pecuniary liability must be personal liability and will not include a liability recoverable only from his property We therefore do not agree with the reasoning of the learned Judge but there are other reasons why this appeal must fail

We have already pointed out that when the mortgagees filed the suit on the basis of the mortgage in the year 1932 they did not implead Subedar Singh and the

decree obtained by them was only against the original mortgagors Bhola Singh and Hakim Singh or their heirs The mortgagees had no right to file a second suit on the basis of the same mortgage and obtain a decree against Subedar Singh Order XXXIV rule 1 of the Civil Procedure Code provides that—

> Subject to the provisions of the Code all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage

The rule does not say what would be the consequence of non joinder of some of the persons interested in the mortgage security or in the right of redemption There has been considerable difference of opinion in the High Courts on the point whether the result of such non joinder must prove fatal to the suit or it is possible to apply to it the provisions of Order I rule 9 of the Code If the defect is detected during the pendency of the suit and the period of limitation has not expired it is always possible to remedy the defect by impleading those who had been wrongly left out but unless the integrity of the mortgage has been broken the mortgage is one and the liability of the mortgagors is joint and several and it is difficult to see how a second suit can be brought against some of the mortgagors who were not impleaded in the first decree for sale Even if however it be assumed that a second suit against Subedar Singh could be filed the period of limitation for such a suit expired in the year 1938 on the expiry of twelve years from the date of the mortgage

Sri *Baleshwari Prasad* learned counsel for the appellants has urged that limitation ceased to run after 1936 as a suit on the basis of a joint debt could not be filed by reason of the provisions of section 7 of the

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Encumbered Estates Act. If there was a joint debt and Bhola Singh, Hakim Singh and Subedar Singh were co-debtors it was not open to the mortgagees to file separate suits against each co-debtor for sale of the mortgaged property and obtain separate decrees. They should have, in accordance with the provisions of Order XXXIV, rule 1 of the Code of Civil Procedure, impleaded all the co-debtors as parties to the suit. If, on the other hand, by some process of reasoning not clear to us, the debt got so split up that the mortgagees had a right to file separate suits against each mortgagor, then there was no reason why the limitation against those who had not applied under the Encumbered Estates Act should not continue to run.

There is one more reason for dismissing this appeal. Gokaran Singh had filed an objection under section 11 of the Encumbered Estates Act and his objection was allowed. In a proceeding under section 11 of the Encumbered Estates Act the learned Special Judge has to determine whether the property claimed by an objector is liable to be sold or mortgaged in satisfaction of the debts of the landlord applicants. By granting the application under section 11 of the Encumbered Estates Act the learned Special Judge must be deemed to have held that the property claimed by Gokaran Singh was not liable for the debts of the landlord applicants. After that decision it was no longer open to Mohan Lal and others to claim that Gokaran Singh was a co-debtor and there should be apportionment of the debt.

The appeal has therefore no force and is dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL

Before Mr Justice Dayal and Mr Justice Bhargava

DISTRICT BOARD BANARAS (DEFENDANT)

v

MESSRS G F KELLNER AND COMPANY (PLAINTIFF)

1953
December 17

Professions Tax Limitation Act, 1941, *s 2—Expression any one person —If includes juristic person—Constitution of India Arts 13 and 31—Professions Tax Limitation (Amendment and Validation) Act 1940 s 2—Tax on circumstances and property if subject to limitations under Professions Tax Limitation Act—Provisions of Professions Tax Limitation (Amendment and Validation) Act whether infringe Articles 13 and 31—District Boards Act 1922 ss 108 and 114*

K a limited company was a caterer and refreshment room keeper at the railway station of M The District Board assessed circumstantial and property tax on K for carrying on business in the rural area

On appeal by the Board

Held (i) that in view of agreement between K and the railway administration K is not a servant of the railway administration or the Governor General in Council and could be taxed under s 114 read with s 108 of the District Boards Act

Held (ii) that the expression any one person in s 2 of the Professions Tax Limitation Act contemplates taxing of any person which includes not only an individual but juristic persons also

Held (iii) that the Professions Tax Limitation (Amendment and Validation) Act does not infringe Arts 13 and 31 of the Constitution

Held (iv) that in view of s 2 of the Professions Tax Limitation (Amendment and Validation) Act the tax on circumstances and property levied under s 108 of the District Boards Act is not subject to limitations laid down under the Professions Tax Limitation Act and the maximum amount

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of such tax can be the amount leviable under the District Boards Act.

District Board of Farrukhabad v. Ping Dutt (1) relied on and *S. L. Kapoor v. Emperor* (2) distinguished.

First Appeal no. 314 of 1946 (connected with Civil Revision no. 102 of 1947) from a decree of B. K. Chaudhari, Additional Civil Judge, Banaras, dated the 9th April, 1946.

The facts appear in the judgment.

G. S. Pathak, G. L. Agarwala and *Kartar Narain Agarwala*, for the appellant.

S. K. Verma, for the respondent.

The judgment of the Court was delivered by—

DAYAL, J.:—Messrs. G. F. Kellner & Co., Ltd. instituted a suit against the District Board of Banaras for a declaration that they were not liable to pay any circumstances and property tax to the defendant and that the defendant's levying such a tax on the plaintiff was *ultra vires* and illegal and for the recovery of the amount that had been realized by the defendant from the plaintiff, such amount being said to be Rs. 1,391-1-4 for the years 1941 to 1945. Amongst various grounds that were urged for the basis of the plaintiff's claim was the ground that the plaintiff was a caterer and refreshment room keeper at the Moghalsarai Railway Station and as such held a service under the Crown and did not carry on business there within the meaning of the United Provinces District Boards Act (Act no. X of 1922).

It may be mentioned that before instituting the suit the plaintiff had objected to the assessment of the tax by the District Board of Banaras and had appealed to the District Magistrate under section 128 of the District Boards Act against the assessment of the tax. The objection and appeal were unsuccessful.

(1) I.L.R. [1949] All. 96. (2) A.I.R. 1937 Lah. 647.

The defendant contested the suit on various grounds One of the grounds was that the plaintiff did not hold a service under the Crown as contemplated by section 114 of the District Boards Act and the other was that the suit as framed was not maintainable in the civil court in view of section 131 of the District Boards Act Other contentions need not be mentioned as they are not material for the disposal of the appeal

The plaintiff further alleged that in case it was liable to the tax the amount of tax could not have exceeded Rs 50 a year in view of section 142A of the Government of India Act 1935 and the Professions Tax Limitat on Act (Act no XX of 1941) The trial court decreed the plaintiff s suit in full The defendant District Board of Banaras has filed this First Appeal

Mes rs G F Kellner & Co Ltd had also instituted another suit in the Court of Small Causes at Banaras for the refund of Rs 500 realized by the D strict Board of Banaras on account of tax on circumstances and property for the year 1945 46 This suit was also decreed and the District Board of Banaras has therefore filed Civil Revision no 102 of 1947 against that decree

We do not agree with the contention for the appellant that the suit was not maintainable in view of section 131 of the District Boards Act If under the provisions of the District Boards Act the District Board could not have taxed the plaintiff company a suit for a declarat on that the tax had been levied illegally could be instituted in the civil court It was held by a Full Bench of this Court in *District Board of Farukhabad* v *Prag Dutt* (1) that if a tax is not imposed in accordance with the provi sions of the United Provinces District Boards Act the District Board can not rely on the Act to oust the juris diction of the civil court We therefore agree with the

(1) I L R [1948] All 26

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Dayal J.

findings of the court below that the suit was maintainable.

Section 114 of the United Provinces District Boards Act lays down the conditions and restrictions which would govern the power of a board to impose a tax on circumstances and property under clause (*b*) of section 108 of the Act. One of such conditions is that the tax may be imposed on any person residing or carrying on business in the rural area provided that such a person had so resided or carried on business for a total period of at least six months in the year under assessment. Section 114 further provides that the words "carrying on business" do not apply to service under the Government or a local body. The expression "service under the Government" was substituted in place of the expression "service under the Crown" by the Adaptation of Laws Order 1950. The Board did not assess the tax on the plaintiff on the basis of his residing within the rural area but has assessed the tax on account of the plaintiff's carrying on business in the rural area. The plaintiff claims exemption from the tax on the ground that what the plaintiff did in connexion with the catering business amounted to service under the Crown. This contention of the plaintiff was accepted by the court below in view of the case reported in *S. L. Kapoor* v. *Emperor* (1). We are of the opinion that the plaintiff's contention is not sound.

On the record of the suit against the decision of which has been filed the civil revision is a copy of the agreement between the plaintiff company and the railway administration. The agreement refers to the plaintiff company as licensees and purports to be in connexion with the licence given to the plaintiff company by the Governor General in Council as represented by the

(1) A.I.R. 1933 Lah. 547

Chief Operating Superintendent East Indian Railway Administration The agreement does not purport to be a contract of service between the plaintiff company and the Governor General in Council Its various terms (shortly to be referred) do not establish what is considered to be the essence of service and of the relationship between a master and a servant The essence of service lies in the control which the alleged master exercises or can exercise over the manner in which the alleged servant carries out the duties he had undertaken to perform

Learned counsel for the respondent relied on the case reported in *Performing Right Society, Limited* v *Mitchell and Booker (Palais De Danse) Limited* (1) It was observed at page 767

> It seems however reasonably clear that the final test if there be a final test, and certainly the test to be generally applied lies in the nature and degree of detailed control over the person alleged to be a servant This circumstance is of course, one only of several to be considered but it is usually of vital importance The point is put well in Pollock on Torts 12th Edition pages 79 80 The relation of master and servant exists only between persons of whom the one has the order and control of the work done by the other A master is one who not only prescribes to the workman the end of his work but directs or at any moment may direct the means also or as it has been put retains the power of controlling the work see per CROMPTON, J in *Sadler* v *Henlock* (2) A servant is a person subject to the command of his master as to the manner in which he shall do his work see per BRAMWELL L J in *Yewen* v *Noakes* (3) and the master is liable for his acts

(1) L R [1924] K B 762 (2) 4 E & B 570 578
(3) L R [1880] 6 Q B 530 532

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Dayal J

neglects and defaults, to the extent to be specified. An independent contractor is one who undertakes to produce a given result, but so that in the actual execution of the work he is not under the order or control of the person for whom he does it, and may use his own discretion in things not specified before hand.

Judged by the test as laid down in that case the agreement between the plaintiff company and the Governor General in Council does not establish the relationship of master and servant between the parties to the agreement. We may now refer to the terms of this agreement to elucidate the point. In para 1 of the agreement the licensees agreed to undertake the catering in the refreshment rooms at various railway stations, including Moghalsarai and to run tea stalls. Under para 2 the licensees had to pay the annual rent for the use of the said refreshment rooms and electric fittings including fans to the East Indian Railway Administration. The payment of such rent is not consistent with the relationship of master and servant and fits in well with the status of the plaintiff company as licensees who had been allowed the use of those rooms and electric fittings. Under para 6 of the agreement the licensees were required to supply to the passengers travelling in the trains at required times refreshment and dishes of sound and wholesome foods and drinks at a scale of rates to be approved of by the Chief Operating Superintendent. Paras 7 to 10 of the agreement lay down certain restrictions about the selling of intoxicants and fix special rates to be charged from the employees of the East Indian Railway Administration. Para 13 provides for the keeping of a complaint book in the refreshment rooms and for the inspection of the complaint book by the Divisional Superintendent or any other official of the Railway Administration. Para 14

lays down that the servants employed by the licensees would be paid by the licencees and would be men of experience kept, at all times neatly and properly dressed Under para 16 the licensees were to supply and maintain all necessary articles of furniture etc, in the said refreshment rooms at their own expense This again is inconsistent with the ordinary relationship of master and servant If the plaintiff company was the servant such articles would have been normally supplied by the master

Para 17 provides that the licensees would keep the said refreshment rooms kitchen, cooking utensils and all other articles neat and clean and would comply with all reasonable requirements of the Divisional Superintendent and of the Medical Officers of the Railway Administration with a view to the provision of sound and wholesome food to the passengers travelling on the East Indian Railway Great stress has been laid on this provision by learned counsel for the respondent in submitting that the Railway Administration fully controlled the working of the plaintiff company The only control which the Railway Administration could exercise by virtue of the provisions of para 17 of the agreement was with respect to the quality of the food to be supplied The control did not extend to the Railway Administration laying down the kind of food to be supplied the way in which it was to be cooked and any other detailed instructions with respect to the providing of various meals etc the plaintiff company had undertaken to cater for It was not open to the Railway Administration to order that any particular dish should be supplied It was not for the Railway Administration to lay down the number of servants the licensees had to engage The Railway Administration could not prescribe or lay down conditions with respect to the purchase of raw materials In all respects relating to

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the running of the business the licensees were free The various conditions laid down did not relate to the actual manner in which the business was to run but related to safeguarding cleanliness both in the preparation of food and in its service to the passengers Other restrictions related to the enforcement of the conditions of certain laws and to the maintenance of orderly conduct at the railway stations

Para 25 of the agreement lays down that—

> the Administration reserve the right to resume possession of any part of the premises if required, for the purposes of working of the said Railway

Para 26 lays down that the Administration agreed that telegrams ordering refreshments would be accepted for despatch by the said Railway free of charge Both these stipulations do not fit in with the alleged relationship of the master and servant A servant has no right against his master with respect to the accommodation on which he performs his duties and no question could arise for making charges on account of telegrams despatched by the Railway Administration on behalf of the passengers in connection with its own work to be carried out by its own servants The same can be said with respect to the stipulation in para 28 by which the Railway Administration agreed to free carriage by rail of various articles required to be used in the said refreshment rooms and restaurant cars

Para 29 of the agreement provides

> The Administration will not be held responsible for any loss or damage occurring to consignments carried free by rail under this Agreement but will take all reasonable care to secure their safe transit

If a servant gets articles on behalf of his master the loss, if any, would be expected to be borne by the master but

this stipulation lays down just the contrary and, therefore is a clear indication of the fact that this agreement did not bring into effect the relationship of master and servant between the Governor General in Council and the plaintiff company It is clear from what has been said above and from other terms of the agreement that the licensee plaintiff company was absolutely free to use its own discretion in respect of the matters about which nothing was said in the agreement in connection with the supervisory control of the Governor General in Council We are therefore of the opinion that as already mentioned the plaintiff company cannot be said to be a servant of the Governor General in Council

The case reported in *S L Kapoor* v *Emperor* (1) is distinguishable A caterer on the termination of his contract did not vacate the premises Order to dispossess him was passed by a magistrate under section 138 Railways Act which provided for such orders against Railway servants It was held that the caterer was a Railway servant both because the expression as defined in the Railways Act applied to him and because the relationship of master and servant existed in view of certain terms of the agreement between him and the Railway Administration Some of such terms are not in the agreement between the plaintiff and the Governor General in Council The Railway Administration in the present case could not fine the plaintiff or direct it about the dress its servants were to wear or about the pattern of crockery to be used To our mind power to give such directions does not affect the question as they do not relate to the main work of the plaintiff which related to the preparation of sound and wholesome food The expression Railway servant means in view of section 3(7) of the Railways Act any person employed by a railway administration in connexion with the service of

(1) A I R 1937 Lah 557

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the Railway The expression service of the Railway is not identical with the expression service under the Crown

We, therefore, do not consider the case to go against the view we have expressed

The evidence about the terms of agreement between the plaintiff company and the Governor General in Council or the Railway Administration on the record of the case giving rise to the first appeal is very meagre and, naturally must fail to establish what the complete agreement on the record of the other case fails to establish It follows that the evidence on the record of the case giving rise to the first appeal fails to establish that the plaintiff company was a servant of the Railway Administration or of the Governor General in Council

It follows therefore that the plaintiff company was liable to be taxed under section 114 read with section 108 of the United Provinces District Boards Act, 1922, and cannot get exemption on account of its business being considered to be due to service of the Crown

Now we discuss the second contention for the plaintiff respondent with respect to the amount of tax to be limited to Rs 50 per annum only

Sub section (2) of section 142 A of the Government of India Act 1935 is to the following effect

> 142 A (2) The total amount payable in respect of any one person to the province or to any one municipality district board local board or other local authority in the Province by way of taxes on professions trades callings and employments shall not, after the thirty first day of March nineteen hundred and thirty nine exceed fifty rupees per annum
>
> Provided that if in the financial year ending with that date there was in force in the case of any

Province or any such municipality board or authority a tax on professions, trades, callings or employments the rate, or the maximum rate of which exceeded fifty rupees per annum the preceding provisions of this sub section shall, unless for the time being provision to the contrary is made by a law of the Federal Legislature have effect in relation to that Province municipality, board or authority as if for the reference to fifty rupees per annum there were substituted a reference to that rate or maximum rate or such lower rate if any (being a rate greater than fifty rupees per annum) as may for the time being be fixed by a law of the Federal Legislature and any law of the Federal Legislature made for any of the purposes of this proviso may be made either generally or in relation to any specified Province municipalities, boards or authorities"

In view of the proviso the Federal Legislature passed the Professions Tax Limitation Act (Act no XX of 1941) Section 2 of that Act lays down

2 Notwithstanding the provisions of any law for the time being in force any taxes payable in respect of any one person to a Province or to any one municipality district board local board or other local authority in any Province by way of tax on professions trades, callings or employments shall from and after the commencement of this Act cease to be levied to the extent to which such taxes exceed fifty rupees per annum

Section 3 of the Act provided that the provisions of section 2 would not apply to any tax specified in the Schedule The Schedule did not mention section 108 or 114 of the District Boards Act

It was contended on the basis of section 2 of the Professions Tax Limitation Act 1941, that the upper limit

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of the tax on circumstances and property leviable by a district board cannot exceed Rs 50 The contention seems to be sound and has been upheld by the Full Bench of this Court in the *District Board of Farrukhabad v. Prag Dutt* (1) The only reply, which learned counsel for the appellant could give to this submission was that the expression any one person , in section 2 of the Professions Tax Limitation Act, must contemplate an individual and not a juristic person which the plaintiff company is We see no reason to restrict this expression to individuals only Sections 108 and 114 of the District Boards Act contemplate taxing of any person and therefore contemplate the taxing of juristic persons There is no indication either in the provisions of section 142 A of the Government of India Act 1935, or in any provision of the Professions Tax Limitation Act which should justify interpreting the expression any one person in the restricted manner in which it is sought to be interpreted on behalf of the appellant We need not linger long on this question in view of what very fairly Sri *Verma* learned counsel for the respondent pointed out practically after the close of the reply for the appellant

He drew our attention to the Professions Tax Limitation (Amendment and Validation) Act (Act no LXI of 1949) This Act came in force on the 28th of December 1949 Section 2 of this Act is

> 2 In the Schedule to the Professions Tax Limitation Act 1941 (hereinafter referred to as the said Act) after Item 3 the following items shall be inserted and shall be deemed always to have been inserted namely
>
> 3A * * * * *
>
> 3B The tax on persons assessed according to their circumstances and property, imposed

under clause (*b*) of section 108 of the United Provinces District Boards Act, 1922 (U P Act X of 1922)

Section 3 of this Amending Act is

3 Notwithstanding anything to the contrary in any other law for the time being in force --

(i) no tax on circumstances and property imposed before the commencement of this Act under clause (ix) of sub section (1) of section 128 of the United Provinces Municipalities Act 1916 (U P Act II of 1916) or clause (*b*) of section 108 of the United Provinces District Boards Act, 1922 (U P Act X of 1922) hall be deemed to be or ever to have been invalid merely on the ground that the tax imposed exceeded the limit of fifty rupees per annum prescribed by the said Act and the validity of the imposition of any such tax shall not be called in question in any court and

(ii) no court shall entertain any claim for the refund of any portion of the tax referred to in clause (i) merely on the ground that such portion is in excess of the limit referred to therein or enforce any decree or order directing the refund on that ground of any portion of such tax

The result of the Amending Act is that the tax on circumstances and property levied under section 108 of the United Provinces District Boards Act is not subject to the limitations laid down under the Professions Tax Limitation Act and that therefore the maximum amount of such tax can be such as can be levied under the United Provinces District Boards Act 1922 which had been in force from before the 31st of March 1939 referred to in section 142 A of the Government of India Act 1935 The upper limit laid down under the rules

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framed by the U P Government under section 114(*d*) of the United Provinces District Boards Act is Rs 2 000 The amount of tax levied on the plaintiff company in any of the years in suit is within that figure and therefore was lawfully levied

Sri *Verma*, however contended that this Act i e the Professions Tax Limitation (Amendment and Validation) Act 1949 was void in view of Articles 13 and 31 of the Constitution as the provisions of this Act deprived the respondent of its property which had been decreed in its favour by the court below with respect to the refund of the amount of tax paid by it We need not deal with this contention at length because we find that, by the Adaptation of Laws Order 1950, the main Act, namely, the Professions Tax Limitation Act (Act no XX of 1941) stood repealed This means that the Act did not remain in force after the coming into force of the Constitution on the 26th of January 1950 and that, therefore no question of its being void in view of Articles 13 and 31 of the Constitution should arise Even if any such question arose it would not affect the validity of the Act prior to the 26th of January, 1950 in view of the amendment carried out in the principal Act and that amendment being deemed to exist from the very first day the imposition of the tax for an amount larger than Rs 50 was valid and its recovery from the plaintiff company was also valid The repeal of the Act would not revive the right which the plaintiff company had lost in the tax which had been realized from it validly

As a result of our findings with respect to the plaintiff-company being not exempted from the tax on circumstances and property leviable under section 108 read with section 114 of the United Provinces District Boards Act and with respect the amount of tax being not subject to any restrictions laid down in the Professions Tax Limitation Act, 1941 the plaintiff s suit should fail

We therefore, allow the appeal, set aside the decree of the court below and dismiss the plaintiff's suit In the circumstances of this case we are of the opinion that the parties should bear their own costs

This order will govern Civil Revision no 102 of 1947

Appeal allowed

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CIVIL MISCELLANEOUS

Before Mr Justice Mootham and Mr Justice Sabru

LALTA PRASAD (APPLICANT)

v

INSPECTOR GENERAL OF POLICE AND OTHERS (OPPOSITE PARTIES)

1953

December 22

Constitution of India, *Art 226— Police Act 1861 s 7—Enquiry against a police officer under it—Police officer stopped from cross examining witnesses—Enquiry if valid—Writ of certiorari whether could be issued*

Where a Station Officer in an enquiry under s 7 of the Police Act against him was stopped from cross examining the prosecution witnesses on the ground that they were leading questions

Held that the enquiry was not proper as it deprived the Station Officer of an adequate opportunity to defend himself and he was entitled to the issue of a writ of *certiorari*

Civil Miscellaneous no 365 of 1952

The facts appear in the judgment

S C Khare, for the applicant

The Junior Standing Counsel (*Jagdish Swarup*) for the opposite parties

MOOTHAM, J —This is a petition under Article 226 of the Constitution In March 1951 the petitioner was the Station Officer, Police Station Neoria in the

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district of Pilibhit. On the 1st June 1951, the dead body of a newly born child was found. The petitioner made an investigation and on the 9th June he instituted proceedings under section 318 of the Indian Penal Code against one Srimati Hulaso. On the 6th July he was transferred to police station Kotwali in the city of Pilibhit. On the 13th July he was placed under suspension, and proceedings were taken against him under section 7 of the Police Act on the allegation that he had extorted money from Sri Pitam Lodh, the father-in-law of Srimati Hulaso, by wrongfully confining him and two other persons on the 2nd and 3rd June. The enquiry was conducted by the Superintendent of Police of Pilibhit, the second respondent, who recommended the petitioner's dismissal from the Police Force. In September, 1951, the petitioner was called upon by the Deputy Inspector General of Police, Northern Range, to show cause why he should not be dismissed and he was furnished with a copy of the findings of the Superintendent of Police. The petitioner submitted his explanation to the Deputy Inspector General but the latter by an order dated the 12th October 1951 dismissed him from service. An appeal by the petitioner to the Inspector General of Police was rejected on the 4th June 1952. The petitioner now prays for the issue of a writ of *certiorari* quashing the orders of the Deputy Inspector General and of the Inspector General on the ground that the enquiry under section 7 of the Police Act was conducted in such a manner as to deprive him of an adequate opportunity of defending himself.

The case is one of some difficulty. No counter-affidavit has been filed on behalf of either of the respondents and the facts set out in the petitioner's affidavit must accordingly be accepted as correct.

According to that affidavit the petitioner was informed at about 4 p.m. on the 13th July that he was urgently

required by the second respondent The petitioner went at once to the Superintendent s bungalow which he reached between 4 and 5 p m and on arrival he was served with the following order dated the preceding day the 12th July

> Please submit your written explanation immediately why proceedings should not be initiated against you for having extorted money from Pitam Lodh resident of village Kalia P S Neoria in the case under s 318 I P C of village Kalia by wrongfully confining Pitam Lodh his wife Punia and his son Beni on 2 6 51 and 3 6 51 You must bring this explanation with you when you report to me as ordered separately in an order sent to you through S O , Kotwali

The petitioner immediately wrote out and submitted an explanation in which he simply denied that he had extorted any money from Pitam or anyone else or had confined anybody wrongfully As soon as this explanation was handed to the second respondent the latter passed an order suspending the petitioner and informed him that proceedings under section 7 of the Police Act would be started then and there against him

It appears that seventeen witnesses in support of the allegations made against the petitioner were then at the Superintendent s bungalow and their statements had previously been recorded by another police officer According to the statement of the petitioner—which as I have said has not been contradicted—the proceedings started by the substance of his deposition which had been recorded in English being translated to each witness who was then asked to sign an endorsement on the record of his statement that it had been read over to him and admitted to be correct Immediately after the summary of his statement had been read to the witness the petitioner was called upon to cross examine him He began to

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cross examine the first witness, but objection was taken by the second respondent, who was presiding over the enquiry to the questions which he put on the ground that they were leading questions The record of the proceedings of the enquiry is not before us and we do not know that was in fact the nature of the questions put by the petitioner but after he had endeavoured to cross-examine the first witness, he made the following application to the second respondent

Sir,

At this stage of proceedings when Mst Punia, P W 1 is being examined and I am allowed to cross examine her, I put certain questions to her to elucidate the facts but neither the questions nor their answers were recorded by your Honour I feel that I am not being given the full opportunity to cross examine the witnesses Moreover the preliminary enquiries were done by your Honour and the proceedings are also being conducted by your Honour So I request that the proceedings should be stopped here and they should be conducted by some other officer of the same rank in order to reach the facts of the case '

On this application the second respondent made the following order

(A) No leading questions to be allowed

(B) This is an absurd demand and there is no provision for sanctioning it in the Police Regulations

Order conveyed to S I who will sign in token of receipt No vexatious delays will be permitted

The petitioner made no attempt to cross examine any of the remaining sixteen witnesses who were then produced

The proceedings were continued the following morning when four further witnesses for the prosecution were examined and it appears cross examined by the petitioner A charge was then framed against the petitioner and further proceedings were adjourned to the 21st July when the petitioner was required to file a written statement and produce his defence witnesses The second respondent refused to summon two of the witnesses whom the petitioner desired to examine but no complaint is made on that score nor is any comolaint made of the fact that the petitioner and two constables, who were alleged also to have been concerned in the act of extortion, were tried jointly

The three principal objections urged by learned counsel to the enquiry against the petitioner were that he had no sufficient warning that an enquiry was about to be held that he had no adequate opportunity of cross examining the witnesses and that under section 35 of the Police Act a charge against a police officer can only be enquired into by an officer having magisterial powers

We have considered the somewhat meagre evidence before us with much care The conclusion to which I have reluctantly come is that the petitioner did not have the opportunity which he ought to have been afforded of defending himself against the very serious charge which had been made against him In arriving at this conclusion I feel bound in the absence of any denial by the respondents to accept the petitioner s version of what occurred as substantially correct, and I assume from the fact that the record of the enquiry has not been placed before us that there is nothing therein which would assist us in arriving at a decision

It appears clear that the petitioner had no adequate warning that proceedings against him under section 7

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of the Police Act were about to be taken The second respondent s notice calling upon him to submit an explanation is dated the 12th July but it was served upon the petitioner only within about an hour of the commencement of the proceedings The petitioner swears that only a summary of the deposition of each witness was translated to that witness and there is nothing in the evidence before us to show that the petitioner was supplied with a copy of the depositions The learned Standing Counsel has very properly not a tempted to support the order of the second respondent that leading questions could not be put in cross examination but he has argued that the petitioner could probably have successfully cross examined the witnesses without putting any leading questions to them It is possible that he might have done so had he been skilled in the art of cross examination but even a skilled cross examiner would be deprived of his most useful weapon if he is deprived of the right to put leading questions

It appears to me that the fact that the petitioner had no adequate warning that an enquiry was about to be held against him coupled with the fact that he was required to cross examine the witnesses on the basis of a summary of their depositions and that he was not allowed to put leading questions to the witnesses placed him in a very difficult position It is certainly desirable that departmental enquiries should be conducted without any unnecessary delay, but the person whose conduct is being enquired into must be given a reasonable opportunity of defending himself not merely by calling defence witnesses but by testing the value of the prosecution evidence by cross examination I find it difficult in this case to resist the conclusion that the petitioner did not have a fair hearing and that the conduct of the enquiry may have proceeded on the assumption that the petitioner was guilty and could have no answer

to the charges Upon the whole I have come to the conclusion that the petition should be allowed on these grounds and it is therefore unnecessary for me to consider the further objection that the charge against a police officer can only be enquired into by an officer having magisterial powers

I would therefore direct the issue of a writ in the nature of *certiorari* quashing the order of the Deputy Inspector General of Police dated the 12th October 1951 and of the Inspector General of Police dated the 4th June, 1952

The petitioner is entitled to his costs

SAPRU, J —While agreeing with the order proposed by my brother MOOTHAM I would like to point out a feature of this case which in arriving at my conclusion I have not overlooked I may say that I consider it unnecessary to recite the facts which have given rise to this application as that task has been done by my brother MOOTHAM I shall therefore go straight to the points to which I wish to draw special attention

Section 7 of the Police Act (Act V of 1861) authorizes the Inspector General Assistant Inspector General and District Superintendents of Police under such rules as may be framed by the Local Government to dismiss suspend or reduce any police officer whom they shall *think* remiss or negligent in the discharge of his duty or unfit for the same Paragraphs 489 and 490 of the Police Regulations published under the authority of the United Provinces Government (as it then used to be called) lay down the procedure which must be followed in order to establish a charge under the section of the Act mentioned above It strikes me that the use of the word think in section 7 is somewhat deliberate One of its dictionary meaning is to judge, to form or hold as an opinion to consider It would thus appear

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to be milder than the expression found or established for it requires a less degree of positive certainty than those words as regards the fact in controversy or dispute. I am mentioning this in order to indicate that I am not basing my conclusions in this case in ignorance of the wider latitude that has been given to the officers concerned in arriving at their decision by this word. The processes, however, by which they must *think* have been indicated by the Regulations and it is because I think that an essential process by which they are required to arrive at their thought has been disregarded that I have come reluctantly to the conclusion that intervention in this case by means of a writ of *certiorari* quashing the order of the Deputy Inspector General of Police dated the 12th October, 1951, and of the Inspector General of Police dated the 4th June, 1952, is called for. To make this position clear I would invite attention to rule 1 under paragraph 490 of the Police Regulations which is to the following effect:

> 1. As much evidence must first be placed on record as the Superintendent of Police considers necessary to establish a charge under section 7 of the Police Act. This evidence may be either oral or documentary and must be material to the charge. If oral—
>
> (*a*) it must be direct, i.e. if it is fact which could be seen or otherwise perceived it must be the evidence of the person who said he saw or otherwise perceived it;
>
> (*b*) it must be recorded by the Superintendent of Police himself in the presence of the officer charged who must be allowed to cross-examine the witnesses, provided that the statements recorded by a Magistrate or a gazetted police officer in the course of a pre

liminary enquiry into the conduct of the officer charged will be admissible and need not be recorded again if

(i) they were originally recorded in the presence of the officer charged and an opportunity was given to him to cross examine the witnesses or if

(ii) though not originally recorded in his presence they are later by a gazetted police officer read out to and admitted by the witnesses in the presence of the officer charged and the officer charged is willing that they should be so read out instead of being recorded anew, and *the officer charged is then given an opportunity to cross examine the witnesses*"

Now while it was no doubt for the Superintendent of Police to decide how much evidence was necessary to establish the charge it was also essential for him to allow a cross examination of the witnesses produced Section 143 of the Indian Evidence Act lays down that leading questions may be asked in cross examination The reason why leading questions are allowed to be put to an adverse witness in cross examination is that the purpose of a cross examination being to test the accuracy credibility and general value of the evidence given and to sift the facts already stated by the witness it sometimes becomes necessary for a party to put leading questions in order to elicit facts in support of his case even though the facts so elicited may be entirely unconnected with facts testified to in an examination in chief Now as has been pointed out by my brother MOOTHAM, after the petitioner had cross examined the first witness an application was made to the second respondent pointing out that certain questions put to Mst Punia and their

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Sapru J.

answers had not been recorded by him. On this application the second respondent *inter alia*, made the very general and wholly wrong order that no leading questions shall be allowed. I think the order passed by the second respondent betrays an ignorance of the principles on which a cross-examination should be allowed to be conducted. It is not suggested that it was not open to the officer conducting the enquiry to disallow a particular question when that question is composite, irrelevant or confusing. But a general order restricting the right of the petitioner to put any leading question at all stands on a completely different footing. The questions disallowed are not before us and it is impossible for us to say what their exact nature was or would have been had they been allowed to be put, but it does strike me that the order was of a much too sweeping character and cannot be justified regard being had to the basic meaning to be attached to the word cross-examine. I am therefore not in a position to say that the petitioner was not handicapped by the general order placing a complete restriction on the mode in which his cross-examination was to be conducted. For this reason I have been driven to the conclusion that it is essential in the interests of justice to interfere in this case. It may well be that the petitioner was abusing his right of cross-examination, but there is no material which would justify us in holding that that was the case. The authorities were under a statutory obligation to give to the applicant an opportunity to cross-examine the witnesses and I cannot escape the feeling that a correct view was not taken of the right of a person charged with an offence under section 7 in regard to cross-examination.

On this ground I have come to the reluctant conclusion that important as the discipline of the Police Force

is and desirable as it is for this Court not to interfere lightly with orders of disciplinary action against police officers there is no escaping the position that the procedure adopted in disallowing all leading questions in cross examination was such as could prejudice a fair hearing of the case against the petitioner The case therefore is one which calls for intervention by this Court and I agree with my brother MOOTHAM that a writ should issue quashing the order of the Deputy Inspector General of Police dated the 12th October 1951 and of the Inspector General of Police dated the 4th June 1952

Petition allowed

CIVIL MISCELLANEOUS

1953
March 10

Before Mr Justice Sapru and Mr Justice Chaturvedi

D N KESARBANI, DR (APPLICANT)

v

THE U P MEDICAL COUNCIL LUCKNOW

(OPPOSITE PARTY)

United Provinces Medical Act, 1917, *s 25—Scope of—Medical graduates subsequently—Medical Council power of to remove his name*

There is no provision in s 25 of the Medical Act which enables the Medical Council to remove the name of a person simply because he has been struck off the register of graduates of the body which originally granted the degree

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D. N. KESARBANI D.

THE C. I. MEDICAL COUNCIL LUCKNOW

Ex parte Partridge (1) and *Hilton* v. *General Council of Medical Education and Registration* (2) referred to.

Civil Miscellaneous No. 7986 of 1953.

The facts appear in the judgment.

A. P. Pandey and *S. P. Kumar*, for the applicant.

The Standing Counsel (*Gopal Mehrotra*), for the opposite party.

The judgement of the Court was delivered by—

SAPRU, J.—This application has been presented under Article 226 of the Constitution to this Court by Dr. D. N. Kesarbani, Medical Officer of Government Tuberculosis Clinic at Allahabad, for various reliefs, and more particularly for a writ of prohibition commanding the opposite party from taking any steps towards erasing his name from the register of Medical Practitioners of this Province.

The facts which have given rise to this application may be stated shortly. Dr. Kesarbani had his early education at the Gurukul Kangri University at Hardwar. He had a bright career at that institution which is one of the best well known private institutions in this country. For various reasons it was the policy of this institution not to have affiliated itself to any university or incorporated as a university by an Act of the legislature. It has played, as has been testified to by educationists of eminence, an important part in the cultural and national life of this country. He graduated himself in medicine from the Gurukul Kangri University in 1928 and was able to obtain a first class degree. That degree, as is well known, is not regarded as a qualification for registration as a medical practitioner. The medical degree at Gurukul is called Ayurved Alankar. Mr. *A. P. Pandey* has invited our attention to the course of study prescribed for this degree and has also placed before us certain question papers set for

(1) L. R. [1887] 19 Q. B. 467. (2) L. R. [1894] 1 Q. B. 750.

candidates for the medical degree a he University Statements by doctors of eminence have been placed before us to the effect that the standard of education in modern medicine of he Gurukul Kangri University is of a fairly good character On this part of the case we may refer to the testimony of a physician of international Reputation Sir R N Chopra He is an M D, Sc D (Cantab) and an F R C P (London) He is a physician of the highest eminence and in the affidavit which he has sworn he states that he believes and *bona fide* believes that the Gurukul Kangri University has a well integrated course in both systems of medicine Indian and Scientific without supplanting the latter

Another physician Dr Kul Bhushan who also holds good qualifications says that the standard of education in modern medicine of the students of the Gurukul Kangri University is of fairly good quality

An ex Principal of he institution Dr Radha Krishna has also filed an affidavit to the effect that the Syllabus and Curriculum of the College in modern medicine can be compared with those of other medical colleges in India He also states tha ample opportunity is provided for practical training in various laboratories and there is enough scope for learning bed side medicine besides the hospital has a large number of outdoor patients

We have referred to the statements in the form of affidavits of these well known persons in order to indicate that the Gurukul Medical Degree is not a degree in what may be called pure Ayurvedic Along with instruction in ancien system of pharmacopoeia instruction in modern systems of medicine is also imparted Whether the standard reached by the Gurukul Kangri University is equivalent to that of Indian universities conferring medical degree is a question which is not relevant for our purposes The bearing of these

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remarks will be evident later We may also quote from the report of the Ayurvedic and Unani System Re organization Committee in 1950 That Committee writes that a scrutiny of the list of examiners for the last three years showed that greater stress was paid in Gurukul Kangri on Allopathic studies than on Ayurvedic studies

We have considered it necessary at this stage to refer to these matters as one of the questions we have had to consider is whether any misrepresentation was made by Dr Kesarbani to the University of Rome when he applied for certain exemptions for admission to the Medical Faculty of the Royal University of Rome for the M D degree We shall refer to this aspect a little later in our judgment We may also mention that the Registrar of the Gurukul Kangri University in his affidavit has stated that the subjects taught in the Gurukul Medical College include anatomy with histology physiology pharmacology and therapeutics hygiene and public health medical jurisprudence and toxicology children s diseases mental diseases, clinical medicine pathology and bacteriology general medicine general regional and operative surgery, midwifery gynaecology According to Registrar, the Curriculum and the text books compare quite favourably with those prescribed for the M B B S examinations of the various medical colleges in India The standard is equally high and among the examiners have been eminent professors or examiners in other medical colleges of India The standard of knowledge in basic sciences i e in Chemistry Physics and Biology of the University students was in no way inferior to that of Intermediate in Science in the officially recognized universities Moreover, it was compulsory for every student to be well conversant with three languages, i e Sanskrit English and Hindi

From these facts the Registrar draws the inference that a graduate of the Gurukul Medical College gets a proper education in pre medical basic medical and professional medical subjects in the most modern way We do not think it necessary to record any conclusion on the question whether the standard reached by the Gurukul Kangri University in its medical examinations is as high as that of the universities created by the Acts of the State Legislatures in India We are satisfied however that it would be incorrect to describe the Gurukul Kangri University as one which imparts education only in an obsolete indigenous system On the question of the efficiency in education imparted by the Gurukul Kangri University opinions may well differ But as to the fact that along with instruction in ancient system of pharmacopoeia instruction in modern system of medicine is imparted there can be no doubt whatever We have felt it incumbent on us to make these remarks because we find that in a letter which was written by the Medical Council to the Royal University of Rome an assertion was made that Dr Kesarbani had misrepresented to them the real nature of the education that he had received at Gurukul That education was described as being an education in the old Ayurvedic system (obsolete indigenous system) and not in modern scientific system as is being imparted in recognized medical colleges in India

We have said that Dr Kesarbani graduated in 1928 from the Gurukul Kangri University Between 1928 and 1930 he worked in several hospitals in Bombay and acquired practical experience for a period of about three years In 1931 he moved to Dehra Dun and built up a good reputation in that city In 1938 he decided to leave for Europe having secured a scholarship for that purpose He decided that he would have his education in Italy and went to that country armed with

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letters from Professor Benoy Kumar Sarkar of Bengal Institute of Sociology Calcutta Dr Sarkar gave him a letter addressed to one Professor Formichi Vice President of the Royal Academy of Italy In this letter Dr Sarkar introduced Dr Kesarbani as a doctor who had studied modern and old system of medicine in the private educational institution the Gurukul Kangri University at Hardwar in the United Provinces He mentioned also that it was known to him that this was one of the leading national universities in India and enjoys high esteem among the nationalists That letter mentioned that Dr Kesarbani had graduated from there in 1928 and since then had been doing some research work That letter also stated that at that time he was practising medicine at Dehra Dun A reference is made in that letter to the fact that one Dr Balram had been given certain exemptions by the University of Munich in Germany for his doctorate in medicine In his opinion Dr Kesarbani's qualifications were not inferior to those of Dr Balram In view of that fact he hoped that there would be no difficulty in his admission and that he would be allowed to take his doctorate examination from the University of Rome There was no scope for a brilliant student like him in this country as he was graduate of a national university Dr Sarkar added that he (Prof Formichi) knew very well the prevailing conditions in this country On receiving his letter of introduction Prof Formichi gave a letter of introduction to Dr Spano Administrative Director of the University asking him to obtain for Dr Kesarbani the facility he was asking for and added that he would be much displeased if he having to face too many difficulties there proceeds to Munich where they had made golden bridges for his admission On the strength of his qualifications as also perhaps of the recommendations which he had brought with him the

University of Rome gave to Dr Kesarbani an exemption of 4½ years The M D of Rome is a six years course but he was allowed to take it in one and a half year He had however to appear in four rigid examinations and he got through them creditably In his final examination he was able to secure distinction and in fact his marks were in the average 88 per cent marks Finally the University of Rome conferred upon him the degree of Doctor of Medicine and Surgery This degree qualified him for practice outside Italy At the time that he went to Italy this country was not at war with it An Italian degree used to be recognized for purposes of a registration of medical practitioners In 1939 the war broke out and he continued to stay in Italy and Germany From 1939 to 1942 he studied medicine and surgery in the University of Munich passed all the examinations comprising twelve subjects and got an M D with distinction From 1942 to 1947 he worked as Lecturer and was Incharge M O of Chest diseases ward of the University Hospital Later in that country he was taken as a panel practitioner in the town of Holzkirchen He was also appointed Doctor in charge for civil personnel in the American Air Field Finally when political conditions were favourable for his return Dr Kesarbani came back to this country in 1947 Even before reaching India he took the precaution of writing a letter to the Chief Minister of Uttar Pradesh intimating to him his intention of return and giving him a synopsis of his qualifications A short time after his return in 1947 he saw an advertisement by the Public Service Commission of U P for the post of the Medical Superintendent Bhowali Sanatorium Naini Tal He applied was interviewed by the Public Service Commission and finally selected by that Commission On the 3rd March 1948 Dr Kesarbani took charge of the Bhowali Sanatorium It may be mentioned that he was

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registered as a medical practitioner by the Medical Council under section 18 of the U. P. Medical Act, 1917. On the 19th December, 1947, he was entitled to be so registered as he had a degree of the University of Rome which was within the meaning of the Indian Medical Act a Royal University of Italy. No objection of any character was made at that time to his registration. It may be mentioned that there was a perfect disclosure on Dr. Kesarbani's part of all the requirements for registration. He gave the Medical Council to understand that he had his preparatory medical education at Gurukul, that after Gurukul he practised for a number of years at Bombay and Dehra Dun and that he was able to obtain an M. D. degree of the Royal University of Rome. The Medical Council with every relevant fact in its possession came to the conclusion that he was entitled to registration and he was so registered.

Suddenly something happened which made the Medical Council change its mind. On the 29th April, 1948, the Registrar of the Medical Council wrote to the applicant a letter asking him to answer three questions. Those questions were—

> (1) When did you leave India for foreign countries?
>
> (2) The qualifications with dates which you secured in India before going abroad. Please mention the names of the institutions where you studied?
>
> (3) The qualifications with dates which you secured outside India and the period of studies and the name of the institutions which you attended to obtain these qualifications?

He replied to this letter in August and sent along with it his certificates in original.

The Medical Council however, chose to take steps which we think, were of an ill advised nature The Registrar of the Medical Council wrote to the Rector of the Royal University of Rome that Dr Kesarbani had made incorrect and false representations He further added that the training he had received was in a university not recognized by the Government of India but was in the old Ayurvedic system (obsolete indigenous system) and not in modern scientific system as was being imparted in recognized medical colleges in India The letter went on to suggest that they did not seem to be fully aware of the fact that Dr Kesarbani was trained in the Ayurvedic system in a private college and an unrecognized university The Registrar further added that he required the information as objections had been raised to his registration with the Council on the ground of insufficient training Reminders were sent on the 29th December 1948 1st January 1949 and 22nd January 1949 on behalf of the Medical Council to the University of Rome requesting them to expedite a reply to their communication dated the 26th November 1948 On the 28th January 1949 the Rector of the Rome University wrote to the Registrar Medical Council that Dr Kesarbani had applied to be admitted in the sixth year course of medicine and surgery on presentation of the following documents

(1) High School Certificate from the residential University of Gurukul at Hardwar dated the 24th April 1924

(2) Diploma Certificate with examinations and marks obtained at the Faculty of Medicine at the same University signed by Vigishwar Secretary and Vishwanath Vice Chancellor

The Council was at first disposed only to give him credit for four complete years as some of the subjects required

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at the Italian University had not been included in his course of study but at the meeting of the Council held on the 24th January 1939 after having received new information and clarifications permitted the above said student to enter the sixth year course with the obligation of passing four examination before being allowed to take his Diploma Examination. It was added that his inscription meaning thereby admission was however subordinated to the presentation of a document proving that the student had a tended a two years course of preparation for the study of Medicine before his entering the Faculty of Medicine of Gurukul University. On the 27th February 1939 the Chancellor and Vice Rector of the Gurukul University informed the University of Rome that the applicant before them had before entering the Gurukul University course for medicine completed a two years course in pre medical subjects. They had before them another letter from one Dr. S. K. Mehta informing them that the applicant had served in the Emergency Hospital Bombay of which he was in charge from May 1929 to 1931, showing great professional capacity and a thorough knowledge of the Ayurvedic cures. It was on the basis of this information that the applicant had been admitted to the sixth year course. According to him, he had passed the examination obtaining in Medicine and Surgery 88 per cent of the marks. He had however not been able to succeed at the examination of the University of Milan. For that reason he would not be permitted to practise the medical profession in Italy. The Director went on to add that the applicant had been admitted to the sixth year course on account of inexact information and documents forwarded by the authorities in India. They added that it was because this inexact information and the documents forwarded by the authorities in India that the authorities of that University were unable

to realize that the Ayurvedic system had fallen into disuse and that the Gurukul Kangri University was not legally recognized by the Government of India There is towards the end of the letter a request that it is desirable that all possible information should be sent regarding the organization of university studies as conducted in India Now Dr Mehta s letter had made it clear that Dr Kesarbani was an authority in Ayurvedic cures There was no inexactness in the letters which were sent by the Chancellor and the Vice Rector of the University of Gurukul It is true that Gurukul is not a recognized university in the sense that it owes its inception to no Act of legislature It is however a well recognized institution whose good work has been highly praised by scholars and educationists of eminence It is well known that it constituted an experiment along new lines in education Its reluctance to accept official help was due to the nature of the Government that was operating in this country before 1947 Gurukul was not an obscure institution It could be classed with well known institutions such as the Shanti Niketan of Rabindra Nath Tagore The standard reached by the medical students at that University may or may not have been comparable with that reached by the students of medical institutions of Indian Universities but it would be a travesty of truth to describe the courses of study at Gurukul Medical Faculty as purely or even mainly confined to indigenous methods We have referred on this point to the eminent authority of Dr Chopra We may say that Mr Ramsay MacDonald who was at one time the Prime Minister of England wrote in 1916 about Gurukul in the following terms

> The Gurukul is the most momentous thing in Indian education that has been done since Macaulay sat down to put his opinion into minute in 1835 '

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We may also remark that the President of our Republic Dr Rajendra Prasad spoke about Gurukul in the following terms

> The present Government is Gurukul s own and the Government also considers the Gurukul as its own hence the Gurukul should form a part of the Government educational system But at the same time I realize that in the making of every country independent educational institutions have a place of their own It is such institutions that can bring about a revolution in education therefore if the Gurukul Kangri would desire to preserve its independent identity the Government shall have no objection The Government shall give it all kinds of help and prompted by this feeling I announce a grant of rupees one lakh to the Gurukul Kangri on behalf of the Government of India

We may also invite attention to the observation of the Universities Commission which was presided over by Dr Radha Krishnan now Vice President of the Indian Republic

> Gurukul Kangri—The institution with its branches has about 1 500 students of whom 100 are of he College grade Vedic research, Ayurvedic research and advanced work in ancient Indian Literature and History have been its specialities Non recognition of its degrees and diplomas had had stood in the way of its popularity but now after half a century of conscientious work, it is being recognized as a real centre of learning '

We have mentioned all this in order to indicate unmistakeably that Dr Kesarbani did not receive his medical education in India in an unknown and obscure institution but at a well recognized institution which did not however for reasons into which it is unnecessary

to enter, receive or desire to receive Governmental aid Subsequent to this letter the Medical Council sent for Dr Kesarbani on 18th March 1949 He was asked to answer certain questions He wanted to place certain documents before the President but the latter did not consider it necessary to give him time for that purpose On the basis of that interview the Council wrote to the Rector of the Royal University of Rome pointing out that the University of Rome had given Dr Kesarbani exemption of nearly 4½ years on an inexact information The Council further found that Dr Kesarbani had not pursued a regular course of studies in any recognized medical college before proceeding to Italy and obtained exemption by supplying incorrect information They pointed out that even though Dr Kesarbani had not passed a college education which would be regarded as good for purposes of registration in Italy he could practise in this country as the degree which he possessed was a registrable degree They felt that they were not in a position to erase his name from their register and they invoked the assistance of the University of Rome for that purpose If the University of Rome could cancel the M D Degree awarded to him on the ground that he had, by supplying incorrect information obtained exemptions it would be easy for them to erase his name from the Medical Register

We are surprised that a responsible body created by the legislature for the maintenance of professional standards should have acted in this irresponsible manner without giving any adequate opportunity to Dr Kesarbani to explain his case Without caring to ascertain in an unbiased manner the case which Dr Kesarbani had to put up, this statutory body chose to write to the University of Rome and went out of its way to suggest that action should be taken against him for

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the cancellation of the degree for which he had worked and toiled hard in Rome. Reluctant as we are to interfere with the autonomy of domestic tribunals and educational institutions which have to maintain standards, we can well understand Dr. Kesarbani's misgivings regarding what this body will do when his case comes up here or it for consideration. This aspect of the matter cannot be ignored by us. For nearly nine month the Medical Council received no reply from the University of Rome. On the 20th March 1951 the Rector of the University of Rome wrote to the President of the Medical Council informing them that the degree which had been conferred on Dr. Kesarbani had in pursuance of their letter been cancelled. This ended the chapter so far as the degree of M.D. is concerned. We understand that Dr. Kesarbani had made an appeal to the Rector of the University of Rome against the order of the University authorities cancelling the degree and that that appeal is still pending before the Rector.

To continue with the story, the Medical Council on receiving the information that the M.D. degree had been taken from Dr. Kesarbani, invited the attention of Government to the effect that Dr. Kesarbani was not a qualified medical practitioner and wrote to them suggesting that he should be removed from government service. In their letter of 18th January 1950 to the Secretary to Government, U.P. Medical (B) Department, Lucknow, the line taken was that the admission of Dr. Kesarbani to the final year of M.D. class of the University of Rome was obtained by conveying inexact information and that Dr. Kesarbani had not obtained a regular and proper training in basic medical subjects and had not been suitably trained. In their opinion, therefore, he was not a fit person to remain in government service in a premier institution of the status of Bhowali Sanatorium. The Medical Council was directed by

Government to get into touch with Dr Kesarbani and give him an opportunity to explain the case which had been formulated by the Council A letter was accordingly addressed by the Medical Council and he was required to send his reply within ten days Thereafter there followed a long correspondence with Dr Kesarbani and the Medical Council into which it is unnecessary to enter But we may however make a pointed reference to the letter dated the 29th April 1951 in which Dr Kesarbani asked the Registrar of the Medical Council to be good enough to send to him the correspondence that had taken place between the University of Rome and the Medical Council The Registrar Medical Council on the 4th May 1951 had the correspondence including the letter of the 31st March 1949, sent to Dr Kesarbani The present position is that Dr Kesarbani has been asked to show cause as to why his name should not be erased from the Medical Register since his M D (Rome) degree has been annulled by the Rome University and he no longer holds the medical qualification necessary for registration under the U P Medical Act A letter to this effect was sent on the 17th April, 1951 and it was followed by letters dated the 5th, 17th and 22nd November and 5th December, 1951 It is against this threatened action that Dr Kesarbani has come up to this Court under its writ jurisdiction

We have already pointed out that there are good reasons why Dr Kesarbani apprehends that he will not get a fair just and impartial hearing before the Medical Council It is at the instance and on the initiative of the Medical Council that his M D degree was cancelled by the University of Rome We can well understand therefore his hesitation in appearing before a body which he has reason to apprehend is not likely to adopt a fair and impartial attitude towards the case put forward by him Apart from this the question of

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law raised in this case requires some consideration. The question is whether the Medical Council has any power to cancel a registration on any ground other than that mentioned in section 25 of the U. P. Medical Act. It is conceded by the learned Standing Counsel that the only section under which action can be taken against him is section 25 of the U. P. Medical Act. Section 26 of the Act can have no application to the facts of Dr. Kesarbani's case as it is limited to cases of infamous conduct in any professional respect. There is no question of infamous conduct in any professional respect so far as Dr. Kesarbani is concerned. Section 25 of the Act runs as follows:

> Any entry in the register of medical practitioners which is proved to the satisfaction of the Council to have been fraudulently or incorrectly made may be erased under an order in writing of the Council after notice has been given to the person concerned and his objections if any have been considered.

It is only in cases where an entry in the register has been made fraudulently or incorrectly that the Medical Council can take action against any registered medical practitioner under section 25. No doubt, the satisfaction that is required is of the Council. But it is obvious that the fraud or mistake has reference to the time when the initial entry was made.

On this part of the case, we may refer to the case of *Ex Parte Partridge* (1). That was a case of a person who obtained a diploma as licentiate in Dental Surgery from the Royal College of Surgeons Dublin, in 1878 and whose name was subsequently entered in respect of that qualification in the Dentists Register kept in accordance with the provisions of the Dentists Act, 1878.

(1) L.R. [1887] 19 Q.B. 467.

(41 and 42 Vic c 33) The Council of the Royal College withdrew that diploma in July, 1885 for the reason that the dentist had been advertising his profession One of the conditions on which the diploma was granted by the Royal College of Surgeons Dublin was that the dentist would not endeavour to attract business by advertisement or by any practice considered by the College to be unbecoming It was further laid down that if this condition was not observed the diploma would be cancelled by the President of the Council A declaration to the effect that he would observe that condition having been made by the dentist the diploma was conferred on him Later it was discovered that he had been advertizing himself and on that basis the General Council of Medical Education and Registration erased his name from the Dentists Register under the Dentists Act 1878

Now we may point out that we have compared the provisions of the U P Medical Act, 1917 with those of the Dentists Act 1878 We find that section 7 of that Act corresponds with section 17 of the Medical Act section 11 with section 23 section 12 with section 17 and section 13 with sections 25 and 26 It is unnecessary to notice other sections of the two Acts On an application for a *mandamus* to the General Council of the Medical Education and Registration to restore the name of the dentist to the Register of Dentists MATHEW J observed that in a case such as the present the Medical Council possessed no further powers of dealing with the register than those conferred in the various sections of the Act He held that the mere fact that the diploma had been cancelled by the Medical authority was not a ground upon which the General Council was justified in disqualifying the applicant or exposing him to the penalties imposed by the Act upon unqualified practitioners The matter went up

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to the court of appeal and we may quote in this connection the remarks of Lord ESHER M R

> It seems to me that these provisions go to show that the power of erasure by the Council is in the nature of a judicial power, and must be confined to the matters into which they are authorized to inquire for the purpose of exercising such power It may be that the local or more limited Medical authority may strike a man off their register for a breach of an undertaking on which he obtained his qualification The Dentists register is a novel institution the creature of the Act of 1878, and it seems to me that there can be no power of dealing with the register so created except those which are given by the Act

LINDLEY L J was more specific He observed

> The effect of our decision is that it will not be competent for the General Council, without exercising their jurisdiction under section 13 (section 13 corresponds with sections 25 and 26 of the Medical Act) and simply because a licentiate of a local medical authority has been struck off the register of that authority, to erase his name from the Dentists Register Section 13 authorises the Council to erase the names of convicted persons and those guilty of infamous or disgraceful conduct in a professional respect There is no provision which enables the Council to remove the name of a person once on the register simply because he has been struck off the register of licentiates of the body which originally licensed him

Now admittedly there is no question here of infamous or disgraceful conduct in a professional respect so far as Dr Kesarbani is concerned We may point out that in the case of *Allinson v General Council of Medical*

Education and Registration (1) LOPES L J made the following observation when dealing with infamous conduct in a professional respect

> The Master of the Rolls has adopted a definition which with his assistance and that of my brother DAVEY I prepared I will read it again If it is shown that a medical man in the pursuit of his profession has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency then it is open to the General Medical Council to say that he has been guilty of infamous conduct in a professional respect That is at any rate evidence of infamous conduct within the meaning of section 29 I do no propound it as an exhaustive definition but I think it is strictly and properly applicable to the present case

In the case before him the applicant had been guilty of infamous conduct in a professional respect There is no suggestion that Dr Kesarbani has been guilty in the pursuit of his profession of conduct which can be regarded as disgraceful or infamous by the profession he belongs to Indeed according to the Medical Council he does not belong to the medical profession at all That being the position the only section which can apply is section 25 of the Act and it strikes us that we can read in section 25 no provision which would enable the Council to remove the name of a person simply because he has been struck off the register of graduates of the body which originally granted the degree That being so the clear view to which we are driven is that the Council is acting without jurisdiction On this

(1) L R [1894] 1 Q B 750

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basis, we think that this is a proper case in which a writ of prohibition should issue restraining the Council from proceeding further with any steps to erase the name of Dr Kesarbani from the Register of Medical Practitioners and we order accordingly The proceedings instituted on that basis are hereby quashed It is unnecessary to pass any orders with regard to the other reliefs claimed by the applicant as our order in regard to prohibition will enable the applicant to get the substance of the reliefs that he claims The applicant will be entitled to his costs which we assess at Rs 500

Order accordingly

CRIMINAL MISCELLANEOUS

Before Mr Justice Dayal and Mr Justice Chaturvedi

DWARKA PRASAD AGARWAL

v

KRISHNA CHANDRA SHARMA AND OTHERS

1953 March 16

Contempt of Courts Act, 1926—*Criminal case during investigation—Case not sent for enquiry or trial in a Magistrate's court—Contempt proceedings if can be started for publication of news or articles—Proceedings which are imminent—Application of Contempt of Courts Act if justifiable to such cases in India*

Contempt proceedings cannot be taken in connection with a publication of news or articles as long as a criminal case is during the course of investigation and has not actually come to a Magistrate's court for enquiry or trial

Extending the rule for punishment of contempt of court to cases which are only imminent unduly hampers with the freedom of speech of citizens and is not justified on the circumstances existing in this country

Criminal Miscellaneous No 16 of 1952

The facts appear in the judgment

P C Chaturvedi, for the applicant

Hira Lal Capoor, for the State and *S N Dwivedi* and *S N Kacker*, for the opposite parties

The judgment of the Court was delivered by—

CHATURVEDI J —This is an application filed by Dwarka Prasad Agarwal for taking contempt proceedings for alleged contempts of court said to have been committed by the opposite parties In the application the alleged contempts are said to have been committed on three occasions The first was an article published in a daily newspaper known as *Jagram*, on the 6th of June 1952 The second act of contempt was committed on the 8th of June 1952 when opposite party no 2 through Babu Lal along with certain other persons sent a resolution passed by the City Congress Committee to the District Magistrate and to the Superintendent of Police The third contempt was said to have been committed on the 9th of June 1952 when the opposite parties nos 1 and 2 are said to have organized a public meeting at which speeches were delivered The writing and the printing of the article as well as the passing of the resolution and sending it to the District Magistrate and the Superintendent of Police are not denied on behalf of the opposite parties but the delivering of speeches at a public meeting on the 9th of June 1952 has not been admitted and the learned counsel for the applicant withdrew his complaint with respect to this third act He has confined his case to the first two acts of alleged contempt

An incident happened on the 2nd of June 1952 at the shop of one Jagdish Prasad Sharma in Manik Chowk Jhansi Two reports of the incident were

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lodged in the police station one by Sumer Singh a servant of Jagdish Prasad and the other by Dwarka Prasad applicant A reading of these two reports shows that there was a quarrel at the shop of Jagdish Prasad and simple injuries were also caused but the versions of the two informants are naturally different As a consequence of the reports Jagdish Prasad applicant was arrested by the police on the 2nd of June 1952 but was released on bail the same day On the 3rd of June one Satya Narayan *alias* Sathoo was arrested and was released on bail on the 4th of June 1952 On the 6th of June 1952 Ram Swarup presented himself in court and was released on bail the same day Satya Narayan and Ram Swarup are co accused with Dwarka Prasad On the 11th of June 1952 Dwarka Prasad filed a complaint concerning this incident before a magistrate and the police sent a charge sheet against Dwarka Prasad, Satya Narayan and Ram Swarup on the 4th of July, 1952 charging the three persons of having committed offences under sections 323 326 and 452, I P C

From the narration of facts given above it would appear that the two alleged acts of contempt in publishing the article and sending a resolution concerning this incident were committed on the 16th of June and 8th of June 1952, respectively They were thus committed after the incident and also after Dwarka Prasad and Satya Narain had been arrested and released on bail and also after Ram Swarup had been released on bail, but before either Dwarka Prasad filed the complaint or the police sent up the charge sheet prosecuting Dwarka Prasad and others The first question therefore, that arises in the case is whether contempt proceedings can be taken in respect of offensive articles or resolutions etc before the institution of any proceeding actually

in court The contentions of the learned counsel for the applicant on this point are two He first contends that offensive statements would amount to contempt even if certain proceedings in court are imminent though they have not actually started and secondly that proceedings in criminal court start at least from the date that the accused are brought before the Magistrate and are granted bail or remanded to custody These are therefore the two questions that we have to consider as regards this preliminary point

It is certainly desirable that people do not publish or resort to any other propaganda concerning matters which are likely to be *sub judice* at the same time regard must be had for the liberty of speech of the citizen Our Constitution guarantees to the citizens liberty of speech with certain safeguards including a safeguard against committing contempts of courts On the one hand as stated above it is desirable that the parties or their friends do not indulge in any propaganda but the difficulty is to what length a court of law should go in stopping this type of propaganda Should all speeches concerning a particular incident be prohibited as soon as the incident has occurred or the prohibition should be imposed at some later stage but before the matter has come to court? In the present case we have to consider whether the publishing of an article in a cognizable case in which the police are proceeding with the matter is a contempt or not before actually the police send up the charge sheet It very often happens that even in cognizable cases the police make arrests and continue investigations for months but ultimately they drop the proceedings when they find that there is not sufficient evidence to go to court, or the allegations of the complainant are incorrect

Tyagi J.

DWARKA PRASAD AGARWAL v. KRISHNA CHANDRA SHARMA

Chaturvedi J.

In this connexion, we propose to consider certain provisions of the Criminal Procedure Code, which lay down the procedure to be followed by the investigating authorities before actually sending up the case to the court for trial. Section 156 Criminal Procedure Code lays down that any officer in charge of a police station may without the order of a Magistrate investigate any cognizable case. Under section 157 he is entitled to investigate into facts where he has reason to suspect the commission of a cognizable offence though no report has been made to him about the occurrence. Under section 160 Cr. P. C. an investigating officer is authorised to require the attendance of all witnesses before him by orders in writing and under section 161 examine such witnesses. Section 165 Cr. P. C. gives power to an officer in charge of a police station to make search under certain circumstances and under section 167 he is directed to forward the accused and the copy of the entries in the diary of the case to the nearest Magistrate. Under section 169 if it appears to the officer that there is not sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate such officer shall if such person is in custody release him on his executing a bond to appear before a Magistrate if and when so required. Under section 170 the officer is directed to send the accused if in custody to the Magistrate entitled to try the accused if the officer finds that there is sufficient evidence against the accused or there are reasonable grounds of suspicion to continue investigation. Section 173 directs an officer in charge of the police station to forward a report to the Magistrate concerning every investigation made by him giving in detail the names of the parties the names of the witnesses and also stating whether the accused has been released on bail or

not. Under sub section (3) of this section the Magistrate is authorised to pass such orders for the discharge of the bail bonds or otherwise in case the accused has been released on bail.

We have given above the powers of the investigating officer conferred upon him by certain sections of the Code of Criminal Procedure. We might also mention here the powers of a Magistrate before he takes cognizance of a case. Section 156 sub section (2) authorises a Magistrate to direct investigation by the police even in a non cognizable case and sub section (3) empowers the Magistrate to direct investigation concerning a cognizable case. Under section 157 the officer in charge of a police station is directed to send the report to a Magistrate having jurisdiction to take cognizance of the offence where the officer suspects the Commission of a cognizable offence. Where a cognizable case has not been investigated into because it was of a trivial nature or because there was not sufficient ground for entering on an investigation the reasons for dropping the investigation have to be mentioned in the report sent to the Magistrate under section 157. Section 159 empowers the Magistrate to direct an investigation into a matter which the station officer proposes to drop and for which he has sent in his report. Where an investigation has not been completed within twenty four hours and the police officer wants more time to investigate into the matter but there are grounds for believing that the accusation or information is well founded the police officer is to send a copy of the case diary and the accused to the nearest Magistrate and the Magistrate may authorize the detention of the accused for a term not exceeding fifteen days. But the Magistrate is to send a copy of his order to the District Magistrate or the Sub Divisional Magistrate containing the reasons

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for his further detention We have already stated that after conclusion of the investigation if the police officer thinks that there is sufficient evidence against the accused the accused if in custody shall be forwarded to the Magistrate authorised to take cognizance of the offence Sections 170 and 173 of the Code appear to refer to the concluding stage of enquiry by an officer in charge of the police station Section 170 refers only to those cases where it appears to the officer that there is sufficient evidence against the accused or reasonable ground of suspicion to justify the forwarding of the accused to the Magistrate whereas section 173 appears to refer to all investigations irrespective of the fact whether there is sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to the Magistrate or not It may be noticed that under both these sections the accused is to be sent to the Magistrate empowered to take cognizance of the offence whereas under section 167 the accused forwarded to the nearest Magistrate

A resume of the powers of the investigating officer as well as the Magistrate shows that the Magistrate is not only a court but also a person in charge of the administration of the district or the local area and he is to be kept informed of all investigations being made by the police officers under his jurisdiction He has further the right to direct further investigation into any case cognizable or otherwise and the police officer is to act according to the directions given by the Magistrate The same Magistrate who has directed the investigation and has been informed of its result is authorised to try the case himself In this state of affairs a confusion arises as to when a Magistrate is acting as an Executive Officer in charge of the administration of a district or a local area and when he acts as a court and

not as an Administrative Officer. The learned counsel for the applicant has argued that whenever the accused is taken before a Magistrate or papers are sent to him concerning a case any order passed by a Magistrate must be taken to be an order passed by a criminal court. But we find ourselves unable to agree with this contention because we find from the different provisions of the Code of Criminal Procedure given above that the Magistrate has actually been given power to direct investigations and also to accept or not to accept a report of a police officer dropping the proceedings against a particular accused. It is quite obvious that an investigation is certainly the stage or proceeding before the case is taken to the court and the argument of the learned counsel would lead to the result that the *court* is required to pass orders even before a case has been launched before it. The learned counsel for the applicant contends that as soon as a person had been arrested as a result of a report made against him the case starts and any matter published with respect to that incident must be taken to have been published during the pendency of proceedings in a court of law. In support of his contention the learned counsel has cited a number of cases of English courts but before proceeding to consider those cases it would be better to briefly mention the salient points of criminal procedure obtaining in England, as the procedure obtaining there is different in material particulars from the procedure obtaining in this country. The first step in the ordinary course of criminal procedure in England is to bring a person charged with a crime before a justice or justices of the peace in order that the charge may be investigated. This attendance is secured either by summons or by arrest under a warrant or otherwise. Summonses and warrants of arrest are issued by a justice on an information being laid before him. (*Vide* Halsbury's Laws of

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England Halsham Edition Volume 9 paragraph 102) Such information is sufficient if it contains a statement of the specific offence with which the accused is charged together with such particulars as may be necessary for giving reasonable information as to the nature of the charge A warrant cannot issue unless there is an information in writing and on oath A summons may be issued on an oral and unsworn information

Criminal prosecutions except where there are statutory provisions to the contrary may be commenced at any time after the commission of the offence A prosecution is commenced when an information is laid before a justice or the accused is brought before him to answer the charge or when an indictment is preferred (*vide* paragraph 100)

It would thus appear that a prosecution commences in England as soon as an information has been laid before a justice or the accused has been brought to answer the charge or, if there is no preliminary examination before the justice when an indictment is preferred The cases cited by the learned counsel are cases where an information was laid on oath before a justice and a warrant was issued on the basis of such information It is quite obvious that in such a case according to the English procedure a prosecution is started immediately But it may be noted that in cases where there is no preliminary examination before a justice a prosecution only starts when an indictment has been preferred Justices of the peace sit in England either as courts of summary jurisdiction or to hold preliminary enquiries when a person is charged with an indictable offence They clearly act as courts of law and when holding a preliminary enquiry into an indictable offence are practically in the same position as a Magistrate in India holding an enquiry into a case triable by

the court of sessions When doing such work the court of the justices is known as court of petty sessions

In *Rex v Parke* (1) it was held that where a matter was published in a newspaper tending to interfere with the fair trial of the charge after the accused has been charged before the petty sessions with an indictable offence triable only at the assizes the Court of King's Bench had jurisdiction to punish the publisher for contempt even though the person charged had not till then been committed for trial After saying that publications like the one in question in that case had a tendency to reduce the court which had to try the case to impotence so far as the effectual elimination of prejudice and prepossession is concerned the learned Judge remarks

> If it be once grasped that such is the nature of the offence what possible difference can it make whether the particular court which is thus sought to be deprived of its independence and its power of effecting the great end for which it is created be at that moment in session or even actually constituted or not? It is perfectly certain that by law it will and must be constituted and that when constituted it and it alone can take cognizance of the particular offence which is the subject of the preliminary inquiry

Later on the learned Judge says

> It is possible very effectually to poison the fountain of justice before it begins to flow It is not possible to do so when the stream has ceased

A number of authorities were cited but the main point argued appears to be that the King's Bench Division could not take cognizance of a contempt of court of the

(1) L R (1909) 2 K B 432

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petty sessions and the decision was against this contention. It would thus appear that before the publication of the article, the accused had been charged before the petty sessions and it appears from a reading of the judgment that the proceedings before the petty sessions were treated as proceedings before a court. No question appears to have been raised that the proceedings before the petty sessions were not proceedings before a court and as a matter of fact no such question could have been raised. The case therefore is no authority for the proposition that the publication of an article concerning a matter before it has come to court at all can amount to contempt. As stated above this case only lays down that the High Court can deal with contempts of subordinate courts and there appears to be no doubt that the court of petty sessions is a court.

The next case cited by the learned counsel is reported in *Rex* v. *Davies* (1) in this case also the main point decided was that the King's Bench Division had jurisdiction to punish for contempt of inferior courts including the court of petty sessions and it appears to have been assumed that the proceedings before the petty sessions were proceedings before a court. The case of *Rex* v. *Parke* was followed and it was further held that the King's Bench Division had also the power to punish for contempts of inferior courts.

In *Rex* v. *Clarke* (2) it was held that after an information on oath had been laid against a person charging him with an offence which may ultimately be tried in the High Court and after a warrant had been issued and the accused arrested any statement published which tends to prejudice the fair trial of the charge amounted to contempt of court. In this case information on oath was laid before one of the metropolitan police

(1) L. R. [1906] 1 K. B. 32. (2) ( ) 103 L. T. 686.

magistrates, and warrants were issued commanding the arrest of Harvey Crippen Crippen was arrested some where outside Quebec While Crippen was still detained in Quebec and his case had not been disposed of by the Judge who was to act under the Fugitive Offenders Act the newspaper published an offensive article While dealing with this point the learned Judge remarked

> No case has been cited to us which says that where the person has been arrested and is in custody upon a warrant proceedings are not pending against him The warrant has been declared by my brother A T LAWRENCE in a case before the Divisional Court, which has been mentioned by my brother PICKFORD to be of itself a judicial act and yet we are asked to say that after the magistrate has performed a judicial act upon sworn information laid before him there are no proceedings against the accused person In my opinion it would be gravely to narrow the jurisdiction of this court to lay down any such rule as that

The decision of this case was based on the practice in England of lodging information on oath before the issue of a warrant by a Magistrate and the act of the Magistrate in issuing the warrant has been held to be a judicial act by itself After this procedure had been followed it was held that the proceedings in the case had been started Under the Code of Criminal Procedure there is no such laying of information on oath and in the initial stages before the case has to come to court the Magistrate is authorised to supervise even the investigation Under section 167 Cr P C he issues a warrant on a police report and in our opinion while issuing such a warrant, the Magistrate does not act as a court but as an officer superior to the officer

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conducting the investigation The investigating police officer has also an authority to arrest persons without a warrant and also to release persons on bail and the Magistrate has only been given wider powers The procedure in England being different from that in India, we find ourselves unable to follow the decision in the above noted English case and to hold that proceedings in court start as soon as a warrant has been issued or an arrest made

The next case referred to is one reported in *Rex v. Daily Mirror* (1) In this case one Edgar William Smith had been arrested upon a charge of shooting a police officer and had been brought before the justices upon that charge But before those proceedings had been completed the articles in question had been published giving photographs of the accused person It was held that the publishing of photographs was likely to prejudice the accused in his identification by the witnesses and was as much contempt of court as the publication of an article giving the facts of the case In the course of the judgment Hon'ble Chief Justice LORD HEWART says

> We are not called upon to consider the question whether there may be contempt of court when proceedings are imminent but have not yet been launched In the present case the question did not arise for there was a charge and there had been an arrest and proceedings therefore had begun Some day that question may have to be decided

The above passage will show that it was taken for granted in the case that proceedings had actually begun and

our comments with respect to this case are the same as with respect to the case of *Rex* v. *Clarke* (1).

The next case cited is *Rex* v. *Davies* (2). This case merely lays down that a criminal cause remains *sub judice* until the time has expired within which notice of appeal to the Court of Criminal Appeal may be given or in the event of such notice being given until the appeal has been heard and determined. This case does not touch the point arising before us and need not be considered in any detail.

We might now come to the cases of Indian courts cited before us. The first case cited is the one reported *in re Subrahmanyan* (*B. B.*) (3). This is a Full Bench case and a number of authorities are considered but proceedings for contempt were dropped and the application dismissed on the ground that the contempt was merely a technical one and not a substantial contempt and also on the further ground that the proceedings before the court were not imminent to the knowledge of the editor and publisher at the time when the articles were published. Both Hon'ble Chief Justice HARRIES and Mr. Justice MUNIR referred to some of the English cases cited above and were inclined to take the view that it was not necessary in a case of a criminal trial for a publication to be classed as contempt of court that the accused should have been committed for trial or even for him to have been brought before a Magistrate provided that he has been arrested and was in custody. The learned Judges actually decided the case on different points and they accepted the decisions of the English courts without considering the question as to whether the procedure provided in the Criminal Procedure Code is the same as the procedure obtaining in England. We have already made our comments on

(1) 103 L. T. 636.

(2) L. R. [1905] 1 K. B. 39.

(3) A. I. R. 1943 Lah. 689.

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the English cases on which the observations in this case are based and as stated above the decision of the case was on different points

The other Lahore case cited is also a Full Bench case reported in *Homi Rustomji* v *Sub Inspector Baig* (1) In this case the counsel for the accused had been arrested by the police while he was preparing to move a *habeas corpus* application before the court This action was held to amount to a contempt of court The action here complained of was depriving the party of having recourse to a court of law The case is no authority for the proposition advanced by the learned counsel for the applicant, in the present case

In *Superintendent and Remembrancer of Legal Affairs, Bihar* v *Munali Manohar Prasad* (2) out of the two articles complained of one was published before the criminal proceedings started and the other was after the proceedings had actually commenced in court It was held that the opposite parties were guilty of contempt and the articles tended to interfere with the proper administration of justice One article having been published after the case had come to the court of the committing Magistrate the question whether the first article also constituted contempt of court did not really have any importance and the point whether the first article also constituted contempt because it was published before the case came to the court of the committing Magistrate has not been considered

The last case cited by the learned counsel for the applicant is *Emperor* v *J Choudhury* (3) In this case it was held that an article commenting on an incident which was under police investigation and which was written before any arrest was made in connexion with

(1) A I R 1944 Lah 106 (2) A I R 1941 Pat 185
(3) A I R 1942 Cal 414

the incident could not be made the subject of contempt of court proceedings provided the editor had neither knowledge nor reasonable grounds for believing that proceedings were about to be launched in respect of the incident In the course of the judgment BISWAS, J remarked

> As a general rule it may be laid down the essence of the offence in this class of cases is that proceedings should be pending when the offending publication appears but the question as to from what stage and up to what stage a proceeding will be deemed to be pending for the purposes of this rule has been the subject matter of considerable discussion

After this the learned Judge considered the English decisions mentioned above and also most of the Indian decisions already mentioned by us In the end he was of the opinion that it was not necessary that the accused should be committed for trial or have been brought before the Magistrate and it would be sufficient if he had been arrested and was in custody Further on the learned Judge remarks that it was not shown that the opposite parties knew or had reason to believe that the proceeding was about to start in connection with the said incident The other learned Judge ROXBURG, J also considered the English cases but he did not clearly express any view of his own After summarising the facts of the English cases the learned Judge has simply stated that in some of those cases the knowledge of the proceedings and the knowledge that they were imminent was therefore clear and the imminence was of a very certain character The third learned Judge AKRAM J simply said that in the circumstances in which the article appeared to have been published he agreed that the rule should be discharged The order which

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their Lordships actually passed could have been passed assuming that the decisions of the English courts laying down when a proceeding should be taken to have commenced were applicable to proceedings in India also One of the learned Judges considered it necessary to say that the proceedings in one of the English cases were imminent and this imminence was of a very certain character, the third learned Judge did not express any opinion on this point

We have considered above all the cases cited by the learned counsel for the applicant and, as stated above, in none of those cases the position of a Magistrate during the course of the investigation proceedings was considered, nor did the decision of any of the Indian cases depended on a decision of the point which we are called upon to decide in this case As stated above, we are of the opinion that contempt proceedings cannot be taken in connection with the publication of news or articles as long as a criminal case is during the course of investigation and has not actually come to the Magistrate s court for enquiry or trial We might in this connection refer to certain observations made by Mr Justice HOLMES in *Craig* v *Hecht* (1) The learned Judge observes

> I think that the sentence from which the petitioner seeks relief was more than an abuse of power I think it should be held wholly void I think in the first place that there was no matter pending before the court in the sense that it must be to make this kind of contempt possible It is not enough that somebody may hereafter move to have something done There was nothing then awaiting decision when the petitioner s letter was published '

(1) 68 Law Ed 293 301

The case cited above also arose out of contempt proceedings though the actual point that arose in the case was different

The Hon ble the Supreme Court of India has laid down in *R R Chari v The State of Uttar Pradesh* (1) that a Magistrate takes cognizance when the police have completed their investigation and come to the Magistrate for the issue of a process It has further laid down that when the Magistrate applies his mind for the purpose of ordering investigation under section 156(3) or issuing a search warrant for the purpose of investigation he cannot be said to have taken cognizance of the offence In this case the above observations were made in connection with the question as to whether the sanction to prosecute the applicant had been obtained before the Magistrate took cognizance of the case or it was subsequently obtained and the argument on behalf of the applicant was that the Magistrate took cognizance as soon as the Magistrate issued a warrant for his arrest The learned Judges repelled this plea and held that a Magistrate does not take cognizance of a case simply because he has issued a warrant of arrest We are further of the opinion that a case does not come to court by the issue of such processes, and the publication of an article concerning the incident before the case has come on the file of a Magistrate as a court does not amount to contempt of court

We might now consider the question as to whether the publication of an article would amount to contempt when the institution of proceedings is imminent and the publisher has knowledge that they are so imminent Excepting the observations in some of the Indian cases cited above none of the English cases

(1) A I R 1951 S C 207

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have laid down that the publication would amount to contempt if the prosecution was imminent.

In the case of *Rex* v. *Daily Mirror* (1), cited above, Lord Chief Justice HEWART observed as follows:

> We are not called upon to consider the question whether there may be contempt of court when proceedings are imminent but have not yet been launched. In the present case the question did not arise, for there was a charge and there had been an arrest and proceedings therefore had begun. Some day that question may have to be decided.

After this case no case has been brought to our notice in which this question has been decided by the English courts. But in one of the Indian cases reported in *Tulsaram* v. *Governor, Reserve Bank* (2), it was remarked that comment on a case which is about to come before the court with knowledge of the fact is just as much a contempt as comment on a case actually launched. This case arose out of the publication of a letter in the *Madras Mail* during the course of the pendency of liquidation proceedings for the compulsory winding up of the Travancore National and Quilon Bank Limited. The application for winding up was presented on the 22nd of June 1938, and the letter was published on the 22nd of July 1938. The petitioner's complaint in the case was that the letter in question constituted contempt of court inasmuch as it expressed an opinion that the winding up petition should be granted and it was held that there was much force in this contention. There was a scheme of preconstruction under consideration at the time though the scheme was actually put up before the

(1) L. R. [1927] 1 K. B. 846. (2) A. I. R. 1939 Mad. 287.

court after the publication of the letter, but the winding up proceedings were already pending and the question under consideration by us in our opinion, did not really arise in that case In the subsequent case of *Rex* v *Daily Mirror* reference is made to *Parke's* case but the case is not taken as finally laying down the proposition that contempt proceedings can be taken even in respect of articles published when a cause is imminent On the other hand it was remarked that that question will have to be decided some day and the observations made in *Parke's* case were cited and distinguished We have already mentioned the grounds on which in our opinion *Parke's* case can be distinguished from the present case

It would be very difficult to draw a line and to say that cases falling towards one side of the line are cases in which the cause was imminent and the cases falling on the other side are the cases in which the cause was not imminent Extending the rule for the punishment of contempt of court to cases which are imminent would unduly hamper with the freedom of speech of the citizen In many cases the citizen will have to take the risk of the court coming to the conclusion that the case had become imminent, while he himself thought that it was not so imminent It is a matter of every day occurrence that a civil suit is thought of but ultimately for various reasons, the idea has to be given up and the case is never taken to the court at all Similarly in criminal cases the accused persons are arrested by the police and at one stage the police is of the opinion that it would prosecute the arrested person but subsequently on the disclosure of some further fact or event they decide not to take the case to the court at all At one time the case may appear to be imminent but subsequently it may transpire that it

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was not fit for the charge sheet to be submitted to court An arrest in England might necessarily mean the institution of criminal proceedings subsequently, but it is not so in our country The extending of the punishment for contempt to cases which are only imminent in our opinion, is not justified on the circumstances as they exist in this country We therefore, come to the conclusion that the preliminary objection should prevail and no proceedings for contempt can be taken against the opposite parties as the alleged acts were committed before Dwarka Prasad s complaint had been filed and long before the charge sheet had been submitted by the police to the Magistrate

We consider it desirable to discuss the other point also as to whether the article dated the 6th of June published in *Jagran* and the resolution dated the 8th of June 1952 sent to the District Magistrate and the Superintendent of Police contained matters tending to interfere with the proper administration of justice and would have been punishable as contempt of the Magistrate before whom the cases are pending in case they had been published after the cases had come to court In our opinion both the article and the resolution contained improper matter and would have merited punishment for contempt of court The article recites the incident giving the version of the opposite parties as the true facts of the case and tries really to exaggerate it much beyond the allegations made in the police report by Sumer Singh In this article it is said that 12 or 15 rioters attacked the shop of a businessman destroyed the goods removed cash from cash box turned out the shop keeper and his servants from the shop and beat them mercilessly before hundreds of people It is then said that the shop keeper had given prior intimation to the police of the apprehended

danger, but the police took no action and the persons against whom the complaint was made had committed similar incidents even before Then it says that a few *goondas* and rioters could, after organizing themselves, disturb the peace and administration of the city The report made to the police by Sumer Singh only speaks of the beating of his master and of himself and of the picking of the cash box which resulted in the dispersal of some small change and some notes We do not want to go into any further detail because the case is *sub judice* We have mentioned the contents of the article and the police report to show that the article did tend to prejudice the case against the applicant and it very much exaggerated the offence and purported to support the version of the opposite parties The resolution also purports to give the version of the opposite parties as the true facts of the occurrence and has tried to exaggerate the case It also tended to interfere with the proper administration of justice and to prejudice the witnesses and others In our opinion the opposite parties would have been liable to punishment for contempt of court in case the article had been published and the resolution had been passed after the institution of criminal proceedings in court But as they were of a prior date, they do not amount to contempt of any court In this connection we might also consider the question whether the prosecution of the applicant on the dates of the article and the resolution was imminent and the opposite parties knew that it was so imminent As stated above the police sent up the charge sheet on the 4th of July, 1952 nearly four weeks after the dates of the article and the resolution The affidavit filed by the applicant does not disclose any facts which would show that the prosecution of the applicant and his companions was imminent on the 6th

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and 8th of June excepting that three of the accused persons had been arrested and released on bail It very often happens that even after such arrests the proceedings are dropped and the case is not actually sent to court The allegations in the report made by Sumer Singh did not disclose the commission of any serious offence and nobody could be certain that the police would prosecute the applicant and his companions on a report containing such allegations The very contents of the article and the resolution show that the opposite parties and their friends were not at all certain that the police would prosecute the applicant and the article as well as the resolution were written and published or sent to the Superintendent of Police and the District Magistrate in order that the accused might be prosecuted The article and the resolution actually contain criticism of the inactivity of the police, and give reasons why the police should take action when offences like this are committed They by no means show that the prosecution of the applicant's party was imminent and was known by the opposite-parties to be imminent The affidavit itself does not disclose any other fact to prove this nor has any other evidence been led on behalf of the applicant to prove the said fact As regards the complaint filed by the applicant on the 11th of June 1952 the opposite parties might very well have thought that the applicant would not like to go to court at all and he actually filed a complaint after nine days of the incident which is an unusually long period taken for filing the complaint No facts have been disclosed in the affidavit which would show that the opposite parties knew that the applicant was going to file a complaint on the 11th of June 1952 There is thus no proof of the fact that the institution of the complaint by the applicant was

imminent on the 6th and 8th June, 1952 or the opposite parties knew that it was imminent In our opinion the applicant has totally failed to prove that the institution of any proceeding concerning this incident was imminent on the dates when the article was published or the resolution was passed Nor could the opposite parties be said to have the knowledge on those dates that the proceedings were imminent We, accordingly dismiss this application but taking into consideration all the facts of the case we think the parties should bear their own costs

The learned counsel for the applicant has prayed for leave to appeal to the Hon ble the Supreme Court The question of law decided by us is one of general and public importance but we have also held on facts that it has not been proved that any proceedings were imminent on the relevant dates, or that the opposite parties knew that any proceedings in court were imminent on those dates We, therefore refuse to grant the leave prayed for

Application dismissed

CIVIL MISCELLANEOUS

Before Mr Justice Dayal and Mr Justice Mukerji

THE J K IRON AND STEEL Co LIMITED
(APPLICANT)

v

1953
April 9

THE LABOUR APPELLATE TRIBUNAL OF INDIA AND OTHERS (OPPOSITE PARTIES)

Constitution of India, *Art 226—Writ of* Certiorari—*Failure on the part of applicant to urge grounds of claiming writ before other Tribunals—Writ, whether could be issued—G O no 615(LL)/XVIII—7(LL) 51 cl 16—Expiry of forty days' period for giving an award by an adjudicator or any other extended period—Governor if could extend the period*

A writ of *certiorari*, which is in the discretion of the High Court to issue under Article 226 of the Constitution shall not be ordinarily issued in cases where an applicant failed to urge the grounds on which be claimed the writ of *certiorari* before other Tribunals where he could have properly urged them unless he could show that he was unaware of them when the matter was before other Tribunals

Under clause 16 of G O no 615(LL)/XVIII—7(LL) 51 dated March 15 1951 the Governor is free to make an order extending the period for the making of an award by an adjudicator even after the expiry of forty days or any extended period

Case law discussed

Civil Miscellaneous No 387 of 1952

The facts appear in the judgment

G S *Pathak* and R S *Pathak*, for the applicant

C *Khare*, for the opposite parties

The judgment of the Court was delivered by—

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THE J K IRON AND STEEL COMPANY LIMITED
v
THE LABOUR APPELLATE TRIBUNAL OF INDIA

DAYAL, J —This is an application under Article 226 of the Constitution for the issue of a writ in the nature of *certiorari* to quash the award dated the 1st November, 1951, and the order dated the 4th July, 1952 of the Labour Appellate Tribunal

The petitioner is the J K Iron and Steel Co Ltd having its registered office at Kamla Tower, Kanpur It dispensed with the services of 128 workers on the 15th May 1951 and served on them a notice to this effect

> Consequent to transfer of the Rolling Mill to Calcutta and want of scrap to work furnace department in full the services of the persons as per list attached are dispensed with from today Their wages and other dues in full settlement will be paid after 2 p m

This dismissal of the workers was challenged on their behalf by the Secretary Iron and Steel Mazdoor Union Kanpur

On the 28th June 1951 the Governor in exercise of the powers conferred by sections 3 4 and 8 of the U P Industrial Disputes Act 1947 (U P Act no 28 of 1947), and in pursuance of the provisions of clause 10 of G O no 615(LL)/XVIII—7(LL) 51 dated the 15th March, 1951, subsequently to be referred to as the Order, referred this industrial dispute between the petitioner firm and its workmen, to Sri J N Singh Additional Regional Conciliation Officer Kanpur for adjudication The matter in dispute was expressed thus in G O no 3092(TD)/XVIII—28(TD) 51, dated the 28th June 1951

> Whether the retrenchment of the workmen given in the Annexure by Messrs J K Iron and Steel Co Ltd Kanpur, is unjustified? If so, to what relief are the workmen entitled?

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Dayal J

Clause 16 of the Order reads

> The Tribunal or the Adjudicator shall hear the dispute and pronounce its decision within 40 days (excluding holidays observed by courts subordinate to the High Court) from the date of reference made to it by the State Government and shall, thereafter as soon as possible supply a copy of the same to the parties to the dispute and to such other persons or bodies as the State Government may in writing direct
>
> Provided that the State Government may extend the said period from time to time

The period of 40 days commencing from the 28th June terminated on the 14th August The Governor however extended the period for the decision of the adjudication up to 15th September by an order dated the 31st August, again to 30th September by an order dated 24th September and lastly up to 1st November 1951, by an order dated the 17th October 1951 It will be noted that these orders extending the period for the decisions of the adjudicator were made after the expiry of the earlier periods and not before the expiry of those periods

The adjudicator made his award on the 1st November 1951

Against this award both the parties to the dispute filed appeals before the Labour Appellate Tribunal of India The Tribunal modified the award holding that the retrenchment was wholly unjustified and that the case was only a case for lay off under Standing Order 16(*a*) and ordering that they be reinstated and be given their full wages for the period above 12 days in every calendar month during which they were not allowed to work and were unemployed It is against this order that this writ of *certiorari* is sought on the grounds that the award of the adjudicator was without jurisdiction

inasmuch as the various extensions of the period for his decision were ordered after the expiry of the earlier period specified for the making of the award and that the adjudicator or the Appellate Tribunal had no jurisdiction to order that the workmen should be played off under the Standing Order 16(*a*) particularly when there was a genuine shortage of material for a long period

Mr *Pathak*, appearing for the petitioner urges that the adjudicator became *functus officio* after the 14th August, 1951 when the period of 40 days commencing from the date of reference expired and that therefore the Governor could not extend the period for making the award by an order passed subsequent to the 14th August 1951 as the effect of such order would not be the mere extension of the period for decision which had expired, but would amount to reviving the right of the adjudicator to make an award a right which had ceased to exist on the expiry of the period of 40 days In support of this contention reliance was placed on the cases of *Brooke* v *Clarke* (1) in re *Macintosh and Thomas* (2) *Straboard Manufacturing Co* v *Mill Workers' Union* (3) and *State* v *Ram Kishan* (4)

It is contended by Mr *Khare*, for opposite party no 4 that the power of the Governor to extend the period for the making of the award under clause 16 of the Order is not limited by any expression to the effect that such an order should be passed before the termination of the period originally fixed or subsequently enlarged by an order made before the expiry of the original period or the extended period and that therefore the various orders extending the periods for making the award were valid orders and the adjudicator could therefore, make the award up to the 1st November 1951 on which date

(1) ( ) 106 E R 148
(2) L R [1903] 2 Ch 394
(3) A I R 1953 S C 95
(4) I L R [1952] I All 876

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he did actually make the award He relies in his support on the cases of *Raja Hari Narain Singh* v *Chaudhrain Bhagwant Kuar* (1) *Ram Manohar Misr* v *Lal Behari Misr* (2), *Lord* v *Lee* (3), *Denton* v *Strong* (4) and *May* v *Harcourt* (5)

We have considered all that had been urged on behalf of the parties and are of opinion that the various orders extending the period for the making of the award by the adjudicator were valid orders it being not necessary that such orders should have been passed before the expiry of the period which was sought to be extended

To extend a certain period is the same thing as to enlarge that period The words to extend and to enlarge are synonymous Whenever any period fixed for doing a certain thing is extended the extension would commence from the point of time when the earlier period ends The contention therefore that there can be no extension when a period already fixed has come to an end in view of what is implied by the term extension is not of any significance when it is not disputed that extension can be made after the expiry of the period in cases where the provision authorising the making of orders extending certain periods uses an expression that such orders could be passed before or after the expiry of the earlier period Such an expression only makes it clear that the order of extension can be passed at any time but cannot give a different meaning to the word extension The argument therefore for the petitioner based on the implications of the word extension to the effect that only what exists can be extended is not sufficient for arriving at the conclusion that the orders about extension must be passed prior to the expiry of the earlier period The provision in

(1) (1891) I L R 13 All 300
(2) (1892) I L R 14 All 348
(3) L R [1868] 3 Q B 404
(4) L R [1874] 9 Q B 177
(5) L R [1884] 13 Q B 668

clause 16 is in most general terms It does not limit the power of the Governor to order the extension within the period to be extended but empowers him to extend the period from time to time In the absence of any such limitation, we are not prepared to narrow down the interpretation of this provision and to hold that the Governor must exercise his power of extending the period before its expiry

Such an order of extension merely substitutes the extended period for the period of 40 days in the main provision of the clause It has nothing to do with the right of the adjudicator to adjudicate on the matter referred to him There is nothing in the order with respect to the revival of his right to adjudicate There is nothing in clause 16 or in any other clause of this Order which provides that the right of the adjudicator to make an award will cease after the expiry of 40 days In the absence of any such expression with respect to the cessation of the adjudicator s power or right to decide the dispute it appears to us that it would be wrong to say that the adjudicator ceases to be an adjudicator or that his right to adjudicate ceases Clause 10 of the Order empowers the Governor to refer any industrial dispute to an adjudicator for decision The referring order dated the 28th June mentions that it is made in pursuance of the provisions of clause 10 of the Order The adjudicator derives his right to adjudicate on the dispute referred to him from the referring order made in pursuance of the powers conferred on the Governor under clause 10 of the Order He does not derive his power to adjudicate upon the dispute under any provision of clause 16 of the Order The provisions of clause 16 simply deal with procedural matters and provide for the adjudicator's hearing the dispute and pronouncing his decision within a certain period which in every case is to be at least of 40 days as mentioned in the clause

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and which period can be extended by the State Government Expiry of any such period, therefore has no effect on his right to decide the dispute That right does not come to an end after the expiry of 40 days He cannot exercise the right to pronounce the award once the period allowed for making the award has expired but if that period is extended subsequently, with the result that the extended period would be deemed to be the original period fixed, the adjudicator can exercise his powers and pronounce his award Clause 13 empowers the Governor to withdraw any such reference There is nothing in the Order providing for the adjudicator s returning the reference undecided to the Governor in case he could not deliver the award within the time allowed Section 6(1) of the Uttar Pradesh Industrial Disputes Act reads

> When an authority to which an industrial dispute has been referred for adjudication has completed its inquiry it shall within such time as may be specified submit its award to the State Government

Clause 16 of the Order says that the adjudicator shall after recording necessary evidence make the award within 40 days It would appear from these provisions of the Act and the order and from the absence of any provision suggesting the return of the reference by the adjudicator in case he could not pronounce the award within the period allowed that the adjudicator is bound to make an award unless the reference to him has been revoked, and that in case he fails to pronounce the award within the time allowed he should take steps to have the necessary period extended

We, therefore construe these various provisions to mean that the adjudicator remains seized of the reference till he makes his award or till the reference to him is

withdrawn by the Governor and that so long as he remains seized of the reference the Governor can make an order extending the period of decision and thus making him competent to make the award No valid objection therefore can be taken to the adjudicator s making the award within any such extended periods

Section 508 of the Code of Civil Procedure Act XIV of 1882 provided for the court s referring a matter to an arbitrator and enjoined its fixing such time as it thought reasonable for the delivery of the award and for specifying such time in the order Section 514 authorized the court in certain circumstances either to grant further time and from time to time to enlarge the period for the delivery of the award, or make an order superseding the arbitration Section 521 provided that no award would be valid unless made within the period allowed by the court

In the case of *Raja Har Narain Singh v Chaudhrani Bhagwant Kuar* (1) the order referring the matter to the arbitrator did not specify the period within which the award was to be made but fixed a date for the disposal of the case which implied that the award was to be made before that date The award was not made within that date The court however extended the periods for the delivery of the award successively making such orders of extension some time beyond the expiry of the period fixed earlier The award was however made on a date beyond the last date of the period fixed by the last order of extension The award was set aside in view of the provisions of section 521 Their Lordships of the Judicial Committee of the Privy Council observed at page 304

When once the award was made and delivered the power of the court under section 514 was spent,

(1) (1903) I L R 28 All 300

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and although the court had the fullest power to enlarge the time under that section as long as the award was not completed it no longer possessed any such power when once the time was passed

The observations therefore mean though it is not so expressed explicitly that the court was competent to extend the period within which the award was to be delivered even after the expiry of the earlier period as had happened in that case on some occasions and that this power was limited by one consideration alone and that was that the order of extension must be made prior to the delivery of the award This limitation was found as a result of the provisions of section 521 and not of section 514 as would appear from the observations of the Supreme Court in *Strawboard Manufacturing Co v G Mill Workers' Union* (1)

It was observed in column 2 at page 96

> In order to give effect to section 521, the Judicial Committee had to confine the exercise of the power to extend the time given to the court by section 514 to a point of time before the award had been made

The case of *Ram Manohar Misr v Lal Behari Misr* (2) was just followed the Privy Council case

In the case of *Lord v Lee* (3) an agreement of reference to arbitration was made and signed on the 8th August 1866 It mentioned no time for the making of the award The arbitrator entered upon the reference at once and made his award on the 17th January 1867 A Judge s order was obtained to the effect that the time for the arbitrator to make his award be enlarged till the 15th of March instant The award was taken up on the 14th March and was in favour of the plaintiff

(1) A I R 1953 S C 95 (2) (1892) I L R 14 All 353
(3) L R [1868] 8 Q B 404

Section 15 of the Common Law Procedure Act, 1864 (17 and 18 Vic c 125) reads

> The arbitrator acting under any such document or compulsory order of reference as aforesaid or under any order referring the award back shall make his award under his hand and (unless such document or order respectively shall contain a different limit of time) within three months after he shall have been appointed and shall have entered upon the reference or shall have been called upon to act by a notice in writing from any party but the parties may by consent in writing enlarge the time for making the award, and it shall be lawful for the superior court of which such submission document or order is or may be made a rule of the court or for any Judge thereof, for good cause to be stated in the rule or order for enlargement from time to time to enlarge the term for making the award

It was held that the Judge had power to enlarge the time after the award had been made and that the effect of the enlargement was the same as if it had been made by consent of the parties viz to [illegible] what had been previously done by the arbitrator without authority and that the award was therefore valid Justice BLACKBURN observed at page 409

> I am therefore clearly of opinion that the section gives power to the Judge to enlarge the term for making the award at any time and under any circumstances in which he thinks there is good cause for his intervention (of course he would not grant an order if he saw that injustice might be done thereby) and the effect of the enlargement is the same as if it had been by the parties it

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amounts to a ratification and is as if the enlarged time had been originally in the submission.

MELLOW, J. observed at page 410:

> but I may say that the very form of expression used in section 10 shows that the object was to put the parties and the arbitrator in the same position as if the original submission had continued the enlarged time so that the arbitrator should during the whole time be clothed with the same authority as that originally given to him though for a shorter period.

LUSH, J. observed at page 411:

> No limit of time is given within which the Judge may enlarge the time and he is not limited to the time within which the arbitrator himself could enlarge it even although it be said in the submission that the arbitrator shall make his award on or before a certain date. If that is so it cannot be any obstacle to the Judge's power that the arbitrator in the interval has done something which is at the time a nullity. The true meaning of the statute is that when the order is once made it annexes to the [illegible] originally limited all the intervening time and such further time as the order expresses.'

This case was followed in *Denton v. Strong* (1) in which the submission to arbitration mentioned that the award was to be made within a month or within such further time (not exceeding three months from the date of the submission) as the arbitrator should enlarge the time to, and again in the case of *May v. Harcourt* (2).

Mr. *Pathak* submits that all these cases related to arbitration and that as the parties themselves could enlarge

(1) L. R. [1874] 9 Q. B. 117. (2) L. R. [1884] 13 Q. B. 688.

the period during which the arbitrator could give the award, the provisions of law allowing the court to enlarge the time for the delivery of the award were construed in that manner It is true that the parties could enlarge the period during which the arbitrator was to give an award but that consideration could not have been of any importance if the provisions empowering the courts to extend the time could not be legally interpreted to mean that the order extending the time could be made even after the expiry of the period It is only when the expressions to be interpreted are capable of more than one meaning that their true meaning is deduced with reference to other matters having a bearing on the point Mr *Pathak* also submits that the court under sections 508 and 514 of the Code of Civil Procedure of 1882 had the power to fix the initial period for the delivery of the award and had the power to enlarge that period and that therefore the expressions empowering the court to extend the time could be interpreted differently from the provisions empowering the State Government to extend the time fixed in clause 16 of the order for the delivery of the award by the adjudicator We do not see any good reason for this consideration affecting the interpretation of the expression in clause 16 empowering the State Government to extend the period from time to time

The case reported in *Strawboard Manufacturing Co v G Mill Workers Union* (1), in which the Supreme Court held that the adjudicator became *functus officio* after the expiry of the time related to the adjudicator's making an award after the date which had been specified in the order of reference and in circumstances when there was no provision in the Act or in the order notified under its provisions about extending the period

(1) A I R 1938 S C 95

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originally specified. It was observed in column II page 97.

> In view of the language of section 6 of the U. P. Act and in the absence of a rule like the proviso to rule 16 referred to above it must follow that the State Government had no authority whatever to extend the time and the adjudicator had become *functus officio* on the expiry of the time specified in the original order of reference and therefore the award which had not been made within that time must be held to be without jurisdiction and a nullity as contended by Dr. *Tek Chand*."

In the absence of any provision for extending the period for the making of the award it must follow that the adjudicator's power to adjudicate comes to an end at the expiry of the period. The same however cannot be said when there is provision for extending the period unless such a provision limits the time for making the order of extension within the period sought to be extended because in that case that power of extending the period could not be exercised after the expiry of the period fixed earlier.

The case *State v. Ram Kishan* (1) referred to an Act ceasing to be in force after the period expressed for its enforcement and it was held that once the Act had ceased to operate any order passed subsequently for the continuation of that Act would be invalid. As already mentioned there is nothing in the U. P. Industrial Disputes Act or the order dated the 15th March 1951 which provides that the adjudicator's power to adjudicate ceases on the expiry of the period of forty days mentioned in clause 16 of the order. This case therefore is not of any help.

(1) I. L. R. [1950] 1 All. 876

In *Brooke* v *Clarke* (1), an author s right of copyright had come to an end before the enactment of another Act which granted the right of copyright for the lifetime of the author, in case the author was alive at the expiry of twenty eight years after the first publication It was in this setting that Lord ELLENBROUGH, C J said at page 148

> The word extension imports the continuance of an existing thing and must have its full effect given to where it occurs and it seems to me that predicating the purpose to be to benefit the author by the extension of his right in adopting a very different idea from recreating an expired right The word extention is too strong for me to grapple with and if the Court were to get rid of its operation a great public injury would be effected by calling back a right that by lapse of time had become extinct

It may be noted that on the cessation of the author s right of copyright at the expiry of twenty eight years after the first publication any person was free to publish that work and if a different interpretation had been given, it would have meant divesting the public in general of a right which had accrued to them on the extinction of the right of copyright in the author at the expiry of twenty eight years after the first publication This case is also distinguishable as there the right had ceased while in the present case as already mentioned the right or power of the adjudicator to decide had not come to an end

In the case of *Macintosh* and *Thomas* (1) an order of the court authorized the Taxing Master to make his certificate in a month unless the said Master extended

(1) 106 E R 148

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the time to enable him to make the certificate, and provided that, in default of the Taxing Master's making of the certificate within such time that order would be of no effect. The Taxing Master's right to proceed with the matter after a month was questioned. BYRNE, J., observed at page 401:

> I think that the force of the words "or this order is to be of no effect" destroys the proceeding altogether: that there is no longer a proceeding under which the taxation can take place and that the power to enlarge the time is meant to be power to enlarge the time while there is a pending matter. But for the final words "or this order is to be of no effect" I think the order would be a substituting order and the time could be extended.

These observations to our mind, do not support the contention for the petitioners. There is nothing in the provisions of the Order to the effect that the reference to an adjudicator under para. 10 would be of no effect if the adjudicator did not make his award within the period of forty days specified in para. 16. When the judgment of BYRNE, J. went in appeal it was reversed on the ground that sub-rule 57 of rule 27 of Order LXV authorized the Taxing Master to extend the time even after the expiry of the time fixed in that order. This sub-rule reads:

> The Taxing Officer shall have power to limit or extend the time for any proceeding before him and where by any general order or any order of the Court or a Judge a time is appointed for any proceeding before or by a Taxing Officer unless the Court or Judge shall otherwise direct such officer shall have power from time to time to extend the time appointed upon such terms if any as the justice of the case may require and although the

application for the same is not made until after the expiration of the time appointed it shall not be necessary to make a certificate or order for this purpose unless required for any special purpose

ROMER, L J, observed at page 408

First it is said that under the very terms of the order it ceases to have any effect after the expiration of the appointed time The certificate not having been made within the month and there being no extension of time within the month it is said that the order was dead and could not be revived In my opinion that is not the right view to take of this order I do not think that it was dead in that sense It is more like a case of suspended animation if I may be permitted to say so In my opinion the power to expend the time in this order meant power to extend it according to the rules—that is according to sub rule 57

Something to the same effect can be said with respect to the proceedings pending with the adjudicator after the expiry of the period of forty days and till the order extending the period is made

It follows that the cases relied on by Mr *Pathak* are distinguishable and not quite opposite to the present case The cases relied upon on behalf of the opposite-party are more in point and support the view we have expressed earlier to the effect that the Governor is free to make the order extending the period for the making of the award even after the expiry of the period of forty days or any extended period and that therefore the adjudicator had jurisdiction to make the award in suit on the 1st November 1951

A preliminary objection was raised by Mr *Khare* at the conclusion of the arguments of Mr *Pathak* that in view of the failure of the petitioners to raise an

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objection before the Appellate Tribunal with respect to the adjudicator's having no jurisdiction to act as an adjudicator after the 14th August 1951 they should not be granted a writ of *certiorari*. Reliance was placed on the cases of *Lakshmanan Chettiar* v. *Commissioner of Corporation of Madras* (1) and *Rex* v. *Williams* (2). These cases support his contention. In *Rex* v. *Williams* (2) a writ of *certiorari* was refused on the ground that the aggrieved party failed to raise any objection to the jurisdiction of the court below at the hearing before that court.

CHANNELL, J. said at page 613:

> No objection was taken to the jurisdiction of the court below at the hearing before that court, that being so it is the rule of this Court not to grant a writ of *certiorari* except upon an affidavit which negatives knowledge on the part of the applicant when he was before the court below of the facts on which he bases his objection.

He further observed at page 613:

> A party may by his conduct preclude himself from claiming the writ *ex debito justitiae* no matter whether the proceedings which he seeks to quash are void or voidable. If they are void it is true that no conduct of his will validate them but such considerations do not affect the principles on which the Court acts in granting or refusing the writ of *certiorari*.

In *Lakshmanan Chettiar* v. *Commissioner of Corporation of Madras* (1) it was observed at page 134:

> The point taken by Mr. *Krishnaswami Ayyangar* is that failure to object to the jurisdiction of

(1) (1927) I. L. R. 50 Mad. 130. (2) L. R. [1914] 1 K. B. 608.

the Court whose order is sought to be quashed only debars the applicant when the objection is one involving the investigation of facts which were or should have been within the knowledge of the applicant when he was before the lower court and does not apply to a contention of law We see no warrant in the cases for drawing any such distinction because in our opinion the test that they lay down is whether the applicant armed with a point either of law or of fact which would oust the jurisdiction of the lower court has elected to argue the case on its merits before that Court If so he has submitted himself to a jurisdiction which he cannot be allowed afterwards to seek to repudiate We are of opinion that the applicant has so conducted himself as to preclude this Court from exercising a discretionary jurisdiction in his favour

Mr *Pathak* argues that this right of an aggrieved person to a writ of *certiorari* is lost only when he fails to bring to the notice of the court below facts on the basis of which its general jurisdiction to deal with that matter would cease and will not be lost in cases in which the facts were well known and the question of jurisdiction was purely a question of law the principle behind this view being that in view of the acquiescence of the aggrieved party to the proceedings in the court below the discretion of issuing a writ of *certiorari* should not be exercised in his favour The case of *Lakshmanan Chettiar* v *Commissioner of Corporation of Madras* (1) does not draw this distinction and clearly lays down that failure to raise a point of fact or of law affecting the jurisdiction of the court below will preclude the aggrieved party from claiming a writ of *certiorari* as a matter of right Mr *Pathak* relies on paragraph 1178

(1) (1927) I L R 50 Mad 130

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at page 532 of Volume 8, Halbury's Laws of England and on the cases of *Ledgard* v *Bull* (1) and *Meenakshi Naidoo* v *Subramaniya Sastri* (2) The aforesaid paragraph 1178 states

> Where by reason of any limitation imposed by statute charter, or commission a court is without jurisdiction to entertain any particular action or matter neither the acquiescence nor the express consent of the parties can confer jurisdiction upon the Court nor can consent give a court jurisdiction if a condition which goes to the jurisdiction has not been performed or fulfilled

This refers to the jurisdiction of a court to entertain any action or matter In the present case the objection is not to the jurisdiction of the adjudicator to entertain the reference made to him by the Governor in pursuance of clause 10 of the Order If the reference had been bad for any reason there would have been an initial lack of jurisdiction in the adjudicator to decide the dispute and no acquiescence or consent of the parties could have conferred jurisdiction on the adjudicator The adjudicator had jurisdiction to decide the reference We have already said that his jurisdiction had not ceased Even if it had ceased it was for the petitioners to raise the objection before the adjudicator with respect to his jurisdiction and to raise it again before the Appellate Tribunal Their failure to raise this objection could be excused only if they were ignorant of it This is not alleged In fact what is urged by Mr *Pathak* is that because the other party as well as the adjudicator knew of the provisions of clause 16 and of the expiry of the period of 40 days from the date of the reference it was not incumbent on the petitioners to

(1) (1886) L R 18 I A 134 (2) (1887) L R 14 I A 160

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raise this point of jurisdiction before the adjudicator We do not find any support for this contention that the knowledge of the facts by the other party or by the adjudicator would be of any help to the petitioners They lose a certain right on account of their failure It is their conduct which has to be looked into and not the conduct of the other parties concerned in the matter The case of *Ledgard* v *Bull* (1) simply lays down that a defendant may be barred by his own conduct from objecting to irregularities in the institution of a suit in a court which was competent to entertain that suit if any such irregularities had been committed and that when the Judge has no inherent jurisdiction over the subject matter of the dispute the parties can not by their mutual consent convert it into a proper judicial process, although they may constitute the Judge their arbiter and be bound by his decision on the merits when these are submitted to him We have already pointed out that the adjudicator in the present case had jurisdiction over the dispute and that what is laid down here does not in any way go against what has been held in the case of *Lakshmanan Chettiar* v *Commissioner of Corporation of Madras* (2) The case of *Meenakshi Naidoo* v *Subramanya Sastri* (3), is also not of much help as it only held that the High Court in that case was inherently incompetent to hear the appeal which had been preferred to it against a certain decision of the District Judge under the Pagoda Act Mr *Pathak* also referred to the case of *Rex* v *West Suffolk Compensation Authority* (4) where certain conduct of the applicants for a writ of *certiorari* was not held to be such as to disentitle them to the relief This case does not in any way throw doubt on what had been held in *Rex* v *Williams* (5)

(1) (1886) L R 13 Q B 134 (2) (1927) I L R 50 Mad 130
(3) (1937) I L R 14 I A 160 (4) L R (1919) 2 K B 374
(5) L R [1941] 1 K B 609

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In view of the above we are of opinion that the writ of *certiorari*, which is in the discretion of the Court to issue under Article 226 of the Constitution should not be issued ordinarily in cases where the applicant had failed to urge the grounds on which he claimed a writ of *certiorari* before the other Tribunals where he could have properly urged the grounds unless he could show that he was unaware of those grounds when the matter was before the other Tribunals

The second point urged by Mr *Pathak*, for the petitioners, was that the adjudicator and the Appellate Tribunal exceeded their jurisdiction in deciding that the order terminating the employment of the workmen opposite party was unjustified on account of the employers not taking action under Standing Order 16(*a*) It is urged that they had merely to see whether the exercise of the discretion vested in the employers by Standing Order 20(*a*) had been properly exercised that is had been exercised in the interest of the industry and had not been exercised arbitrarily *mala fide* or with a view to victimise certain workmen We do not find any restriction on the powers of the adjudicator and the Tribunal with respect to the matters they have to take into consideration in coming to a conclusion on the point of dispute referred to the adjudicator The issue referred to the adjudicator was simply whether the dismissal of the workmen was or was not unjustified and if it was unjustified to what relief they were entitled The adjudicator held that there was shortage of scrap iron that the complaint that the shortage was deliberate and management created was not correct that the shortage of scrap iron was of a temporary nature and would probably last for about eight or nine months that he was not convinced that the management had any *mala fide* intentions that their

bona fides were clear and that he could not hold that the retrenchment was at all motivated by any harassment or victimisation on the part of the management He however was of opinion that the employer company should offer the option of employment to their workmen in their new set up in Calcutta and that the retrenched workmen should be kept on the roll of the factory from immediate effect with continuity of service and they should be played-off in accordance with trade reasons The Appellate Tribunal agreed with the adjudicator's opinion except with respect to the Standing Order in accordance with which the retrenched workmen were to be played off Standing Order 15(*a*) contemplates what the company is to do in the event of a fire catastrophe, breakdown of machinery or stoppage of the power supply or some other causes beyond the control of the company and allows the company to stop any machine or department for any period without notice and without compensation in lieu of notice Standing Order 16(*a*) allows the company in the event of shortage of orders or for any other trade reasons to stop any machine or machines or departments for a period, not exceeding 12 days (excluding statutory holidays) in any one calendar month, without notice and without compensation in lieu of notice The Standing Order 20(*a*) allows the company to terminate the employment of any permanent operative by giving 14 days notice or by payment of 12 days wages in lieu of notice, and requires the termination of service to be recorded in writing and communicated to the operative if he so desires at the time of discharge It is contended by Mr *Pathak* that the petitioner company exercised its discretion given to it under Standing Order 20(*a*) in spite of its discretion to play off for trade purposes under Standing Order 16(*a*) and that the Tribunal had no jurisdiction to question this right exercised *bona fide*

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THE J K IRON AND STEEL COMPANY LIMITED v THE LABOUR APPELLATE TRIBUNAL OF INDIA

Dayal J

As already mentioned, we do not find anything in the U P Industrial Disputes Act or in the Order, or in the particular order of reference to the adjudicator, which restricts the power of the adjudicator with respect to the matters he has to take into consideration in coming to the conclusion whether the retrenchment of the workmen was unjustified He was free to take into consideration all such matters as could have a bearing on the question, and one such matter could have been to see whether it was absolutely necessary to retrench the workmen The standing orders did contemplate the contingency of trade reasons requiring the stopping of any machine or machines or department or departments for certain periods, and provided in Standing Order 16(*a*) that in such contingency the company may stop any machine, etc for a period not exceeding 12 days in the aggregate This implies, to our mind that so long as it is possible for the company to play off, for trade purposes under Standing Order 16(*a*), it should not take the extreme step of dispensing with the services of its employees We are of opinion that this consideration is very relevant to the consideration of the point which had been referred to the adjudicator, and that it cannot be said that the adjudicator or the Appellate Tribunal exceeded their jurisdiction in deciding the dispute referred to the adjudicator and which came up in appeal before the Appellate Tribunal We may refer to the case of *Madras State* v *C P Sarathy* (1) It was observed at page 58

> But the adjudication by the Tribunal is only an alternative form of settlement of the disputes on a fair and just basis, having regard to the prevailing conditions in the industry and is by no means analogous to what an arbitrator has to do in

(1) A I R 1953 S C 192 195

determining ordinary civil disputes according to the legal rights of the parties

This supports our view that the adjudicator or the Appellate Tribunal was not restricted with respect to the matters which should be taken into consideration by them in coming to a conclusion on the question referred about the justifiability of the retrenchment of the workmen We are, therefore of opinion that neither the adjudicator nor the Appellate Tribunal exceeded their jurisdiction in taking into consideration the various points they did consider in arriving at the conclusion

We, therefore, hold that the award of the adjudicator and the order of the Labour Appellate Tribunal are valid and that no case is made out for the issue of a writ in the nature of *certiorari* quashing them We accordingly reject this application with costs which we assess at rupees two hundred

Application rejected

CIVIL MISCELLANEOUS

Before Mr Justice Mootham and Mr Justice Gurtu

BABURAM SHARMA (APPLICANT)

v

1954 April 27

THE STATE OF UTTAR PRADESH AND OTHERS (OPPOSITE PARTIES)

Constitution of India, *Art 226—Error apparent on the face of record—High Court if can correct it*

The High Court in the exercise of its jurisdiction under Article 226 of the Constitution can correct an error which is apparent on the face of the record and which goes to the root of jurisdiction

Verappa Pillai v Raman and Raman Ltd (1) *R v Northumberland Compensation Appeal Tribunal Ex parte Shaw* (2) referred to

Civil Miscellaneous No 556 of 1952

The facts appear in the judgment

V D Bhargava for the applicant

The Standing Counsel (*Gopalji Mehrotra*), for the opposite parties

MOOTHAM, J This is a petition under Article 226 of the Constitution in which the petitioner prays, first for the issue of a writ of *certiorari* to quash two orders of the Regional Transport Authority Meerut dated respectively the 21st July and the 3rd November, 1951, and an order of the State Transport Tribunal, dated the 6th August 1952 and secondly, for a writ of *mandamus* to issue to the State Transport Authority, Lucknow to

(1) A. I. R 1952 S C 192 195 and 199 (2) [1952] 1 All E R 122

compel it to accept the replacement of one motor vehicle by another

The petitioner is engaged in the business of plying stage carriages, and he has been doing so since the year 1930 The facts upon which the petitioner relies are set out in the affidavit which accompanies his petition and is of importance to observe that no counter affidavit has been filed He states that in September, 1949, the Provincial Transport Authority was prepared to sanction the issue to him of a temporary permit but as the petitioner had sold the vehicle which previously he had owned and was not possessed of sufficient money to purchase a new vehicle he approached a financer named Chatter Sen for financial assistance On the 23rd September, Chatter Sen purchased a stage carriage for the sum of Rs 16,500, and on the 29th October—learned counsel are agreed that the date 29th September in paragraphs 9, 10 and 11 of the affidavit should be the 29th October—he sold the vehicle to the petitioner and as a form of security for the protection of Chatter Sen the petitioner executed on that date four documents namely

(i) An agreement wherein, after reciting that he had resold the stage carriage to Chatter Sen for Rs 19 000 the petitioner undertook to be responsible for such application and affidavit as may be required to complete the transfer and Chatter Sen undertook to pay such taxes on the vehicle as might become due

(ii) a letter addressed to the Regional Transport Officer, Meerut stating that the stage carriage had been sold to Chatter Sen

(iii) a power-of attorney in favour of Hukum Chand the son of Chatter Sen authorizing him to draw petrol for the vehicle, to deposit the road taxes renew the permit and to file applications

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Mooker m J

and affidavits on behalf of the petitioner in connexion with the vehicle and

(iv) a form of declaration intended to serve as evidence and be of use when needed acknowledging that he had sold the vehicle and the permit therefore, to Chatter Sen for Rs 19 000 and had received this amount

The petitioner says that when he executed these documents on the 29th October the documents were not dated and blanks were left to be filled in when the registration number of the vehicle and the number of the permit were known No date has been inserted in the letter to the Regional Transport Officer The 9th November 1949 was subsequently inserted as the date of execution of the agreement and the power of attorney and the receipt are now dated the 29th November 1949 The petitioner says that these dates were inserted by Chatter Sen The petitioner further states in paragraph 7 of his affidavit that similar documents had been executed by him at the request of Chatter Sen when he had acquired vehicles from the latter in 1943 and 1944 and that after he had paid the purchase price the documents were all returned to him

On the 29th October—the date on which the petitioner says the above mentioned documents were executed—a temporary permit no 43M(T) was issued to him and on the 10th November of that year, the vehicle was registered in the petitioner s name and given the registration no USL 3167

In May 1950, this Court in the case of *Moti Lal* v *State of Uttar Pradesh* (1) commented adversely on the practice of the Transport Authorities in issuing only temporary permits and as a consequence of the judgment in that case the Motor Vehicles Department

(1) I L R [1951] 1 All 289

invited the holders of temporary permits to apply for permanent permits The petitioner did so and on the 30th September 1950 his application was published in the official *Gazette* in accordance with the provisions of section 57 of the Motor Vehicles Act No objection to the application having been lodged the petitioner was granted a permanent permit on the 13th December 1950 The permit was numbered 133 and was declared to be valid up to the 13th December 1953

The petitioner says that Chatter Sen then started creating trouble and tried forcibly to stop the petitioner from running the stage carriage no USL 3167 and that as a consequence of this the petitioner applied to the Transport Authorities on the 15th January 1951 to be allowed to replace vehicle no USL 3167 by another vehicle no USL 3810 This application was allowed by the Regional Transport Officer subject to confirmation by the Regional Transport Authority

On the 23rd January 1951 Chatter Sen filed a suit against the petitioner in the court of the Civil Judge Meerut, for a declaration that he was the owner of permit no 133 and he applied for an interim injunction to restrain the petitioner from plying vehicle no USL 3167 The court refused to grant an interim injunction and its decision was upheld by his Court on appeal On the 31st January, Chatter Sen also addressed a letter to the Regional Transport Authority objecting to the petitioner's application for the replacement of one vehicle by another on the ground that he was the sole owner both of vehicle no USL 3167 and of permit no 133

On the 21st July 1951 the petitioner's permit no 133 was suspended by the Regional Transport Authority, and notice was issued to him to show cause why it should not be cancelled At the same time the

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Meotham J

Regional Transport Authority refused to allow the petitioner's application for replacement

On the 3rd November, 1951 the Regional Transport Authority, Meerut, made the following order

> The original permit was no Mt 43 covering vehicle no 3167 It is established by the deed dated the 9th November 1949 that Babu Ram sold the vehicle and the permit in favour of L Chatter Sen Chatter Sen has all along been in possession of that vehicle and has been running it Babu Ram could not sell the vehicle and the permit without obtaining the permission of the Regional Transport Authority Blanks to fill in number, etc were only left in the deed dated the 9th November 1949 Babu Ram later wrote out an application addressed to the Regional Transport Officer that he has sold the vehicle and permit to Chatter Sen Babu Ram is not therefore entitled to retain the permit The permit no 133 is a successor of permit no Mt 43 Permit no 133 is cancelled The question of transfer of permit does not arise as no permission for transfer was taken

Against that order the petitioner appealed to the State Transport Authority which heard the appeal on the 6th August, 1952 The State Transport Authority had properly cancelled the permit no 133 under section 60(*d*) of the Motor Vehicles Act on the ground that the permit was obtained by misrepresentation It also held that at the time when the petitioner asked for the replacement he was not in possession of vehicle no USL 3167 and that therefore, the permit was liable to cancellation under section 69 (*c*) of that Act It accordingly dismissed the appeal

The petitioner contends that at all material times he was in possession of the vehicle and he denies that he obtained the permit, no 133 by any fraud or mis representation He says that there is no evidence to support any finding to the contrary and that this Court can and should give him the relief which he seeks on the ground that the order is vitiated by an error apparent on the face of the record and that it amounts to a violation of the principles of natural justice

It is common ground that on the 29th October the motor vehicle no USL 3167 was sold by Chatter Sen to the petitioner and that the latter was given possession of it The petitioner swears that on that date he signed the several documents to which I have referred although the documents were not then dated and blanks were left for the insertion of certain particulars He also swears that these documents were executed solely for the purpose of affording Chatter Sen security for the payment by the petitioner of the purchase price of the vehicle There is as I have said, no counter-affidavit the only evidence to which the opposite parties can refer in order to disprove the statements made by the petitioner being the documents themselves But the documents are, in my view clearly consistent with the petitioner's version of what occurred and I find it hard to appreciate for what purpose the vehicle was admittedly sold to the petitioner if on the same day he resells it to his vendor for the same price Be that as it may the question which is of importance is not the legal title to the vehicle but who was in possession of it, for the right to obtain a permit depends on possession and not ownership *Verappa Pillai v Raman and Raman Ltd* (1) Now it is clear that the petitioner was in possession of the vehicle on the 29th October according

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to his affidavit (paragraph 17) he was in possession in January 1951 and that that was, as appears clearly to be established by the fact that it was in that month, that Chatter Sen tried unsuccessfully to obtain from the Civil Court an injunction to prevent him for using the vehicle. I can find no evidence whatever to show that the petitioner was not in fact in possession of the vehicle at all material times. Any finding therefore that the Regional Transport Authority was entitled to cancel the permit under section 60 (c) is, in my opinion, unsupported by any evidence. Nor can I find any evidence to show that the applicant obtained the permit no. 133 fraudulently or by misrepresenting that he was in possession of stage carriage no. USL 3167 when that was not the case. Our attention has been drawn to the application form P. St. S. A. which is the form of application for a permit applicable in the present case under rule 50 (a) (ii) of the U. P. Motor Vehicles Rules, 1940. It is pointed out to us and I think correctly that fraud or misrepresentation could arise only in respect of the particulars to be entered in either clause (10) or clause (14) of this application. Clause (10) requires the applicant to give particulars of any stage or contract carriage permit valid in the State which is held by him. On the date on which the application for a permanent permit was made the petitioner held a temporary permit no. Mt. 43. In clause (14) of the application, the applicant is required to state whether he was then in possession of the vehicle in respect of which the permanent permit was applied for. The evidence in my view is all one way and shows that the petitioner was in possession of the vehicle no. USL 3167.

The Regional Transport Authority and the State Transport Tribunal are administrative bodies exercising quasi judicial functions as regards the issue and cancellation of permits. I am fully conscious of the fact that this Court is not in the exercise of its powers under

Article 226 of the Constitution entitled to usurp the jurisdiction vested in those bodies or to constitute itself a Court of appeal from their decisions This Court would have no power, in my view save possibly in very exceptional circumstances to interfere with the decision of the State Transport Tribunal on a question of fact in any case in which there is conflict of evidence But that in my judgment is not the case here for as I have said I have been unable to find any evidence that the petitioner was not in possession of vehicle no USL 3167 at material times or that he obtained permit no 133 by fraud or misrepresentation The result is therefore that the Regional Transport Authority and the State Transport Tribunal have arrived at a finding of fact which is not only unsupported by any evidence but is contrary to such evidence as there is and to come to a finding of fact in the absence of any evidence amounts in my view, to an error of law if not to a violation of the principles of natural justice An error of law apparent on the face of the proceedings is recognized in England as good ground for the issue of an order of *certiorari*, *R v Northumberland Compensation (Appeal Tribunal* ex parte *Shaw* (1) and although our attention had not been drawn to any case in India in which the same view has expressly been taken it would appear to be in accordance with the pronouncement of the Supreme Court in *Venappa Pillai's case* (2) where CHANDRASHEKHAR AIYAR J delivering the judgment of the Court, said

> Such writs as are referred to in Article 226 are obviously intended to enable the High Court to issue them in grave cases where the subordinate tribunals or bodies or officers act wholly without jurisdiction or in excess of it or in violation of the principles of natural justice or refuse to exercise

(1) [1952] All E R 122 (2) A I R 1952 S C 192 95

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Gotham J

a jurisdiction vested in them, or is an error apparent on the face of the record

For the reason I have stated, I am of opinion that the petitioner is, in this case entitled to relief and I would direct the issue of a writ of *certiorari* quashing the orders of the Regional Transport Authority, dated the 21st July and the 3rd November 1951 and the order of the State Transport Tribunal, dated the 6th August 1952

As regards the second of the petitioner's prayers I do not think it would be proper for this Court to direct the State Transport Tribunal to accept the replacement of vehicle no USL 3167 by vehicle no USL 3810 but I think that this Court can properly direct that that authority should now proceed to consider the petitioner's application for replacement on its merits The petitioner is entitled to his costs

GURTU, J This is an application under Article 226 of the Constitution of India The applicant prays that a writ of *certiorari* or such other writ, order or direction as the Court may deem fit be issued whereby the orders of the Regional Transport Authority dated 21st July, 1951 and 3rd November 1951 as also the orders of the State Transport Authority Tribunal dated 6th August 1952 be cancelled The applicant also prays that a writ of *mandamus* be issued to the opposite party no 3 commanding him to accept the replacement of vehicle no USL 3167 by no USL 3810 and to allow the applicant to run the same and to return the permit

The applicant is an operator who has been plying motor stage carriages on permits since the year 1930 In September 1949 the Provincial Transport Authority decided to issue temporary permits which the applicant desired to apply for The applicant was not then possessed of enough money to purchase a stage carriage to enable him to apply and he approached one Lala Charter Sen for financial assistance On 23rd Septem

ber 1949 Lala Chatter Sen purchased a stage carriage bearing temporary Registration no 476 T from India Automobiles Delhi for a sum of Rs 16 500 The aforesaid vehicle was on 29th October, 1949 transferred to the applicant the fact of sale being endorsed on the present receipt issued by the Indian Automobiles to Lala Chatter Sen

At the same time the applicant as first party and Lala Chatter Sen as second party executed an agreement wherein the applicant stated that for a consideration of Rs 19 000 the applicant had resold the said stage carriage under a receipt to Lala Chatter Sen It was stated in that agreement that the parties would be bound by the terms of the agreement which *inter alia*, were that the applicant would have no concern with the permit of the stage carriage or the stage carriage itself and that when an application for transfer was made the applicant would make the necessary affidavit It was also agreed that Lala Chatter Sen would in every way be the owner of the stage carriage and that the applicant would have no objection thereto and further, that Lala Chatter Sen would have the right to sell the said stage carriage

This agreement was executed according to the applicant on 29th October 1949 the space for filling in the permit number later when assigned and the Registration number also when assigned being left blank These numbers according to the applicant when subsequently assigned were filled into the agreement At the same time according to the applicant an application addressed to the Regional Transport Officer Meerut was also signed by him wherein it was stated that the stage carriage had been sold and that the name of Lala Chatter Sen should be substituted on the permit and the Registration

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A power of attorney was also executed by the applicant in favour of Sri Hukum Chand Jain, son of Lala Chatter Sen, authorizing Hukum Chand Jain to draw petrol ration of the stage carriage deposit the road taxes renew the permit and fitness of the vehicle, and further authorizing him to file applications and affidavits on behalf of the applicant in connexion with the stage carriage

On the same day the applicant gave a receipt for the purchase money received in respect of the sale of this stage carriage, including the permit and all rights to Lala Chatter Sen

According to the applicant, all these documents were executed on the 29th of October, 1949 although the receipt and the agreement bear the date 9th November, 1949 the explanation being that the dates in the later documents were filled in later after the Registration and permit numbers had been obtained

The applicant alleges that all these documents were agreed to be returned when the money due in respect of the stage carriage, which Lala Chatter Sen had purchased and had transferred to him was paid to Lala Chatter Sen and that the documents were merely taken by Lala Chatter Sen as security and to safeguard his position

The applicant further alleges that consequent to a judgment of this Court, which questioned the legality of the grant of temporary permits for stage carriages which were regularly operating, applications for the issue of permanent permits were called and the applicant applied for the issue of a permanent permit in place of his temporary permit The application of the applicant for a permanent permit was published in the *U P Gazette,* dated the 30th of September, 1950 for any objections under section 57 of the Motor Vehicles Act No objections were however, filed and therefore

on the 13th of December 1950 a permanent permit no 133 was granted to the applicant which was to be valid up to the 13th of December 1953 The applicant alleges that thereafter Lala Chatter Sen the financier started creating trouble and tried to forcibly stop the running of the stage carriage which he had sold to the applicant under a receipt on 29th October 1949 and so the applicant applied on the 15th of January 1951, that there was dispute about this stage carriage no USL 3167 and that he should be allowed to replace it by another stage carriage no USL 3810 The Regional Transport Officer allowed the replacement subject to confirmation by the Regional Transport Authority

On the 30th of January 1951, Lala Chatter Sen objected to the replacement by an application made to the Regional Transport Authority alleging that he was the full owner of stage carriage no USL 3167 and of permit no 133 and that he had filed a civil suit and had applied for an injunction and that, therefore, further action in replacing the vehicle be stayed pending the orders of the civil court Lala Chatter Sen had filed the suit on the 23rd of January 1951 for a declaration that he was the owner of permit no 133 present and old no 43MT sanctioned with stage carriage no USL 3167, with all rights to ply Lala Chatter Sen applied later for an *ad interim* injunction on which notice was issued This *ad interim* injunction was however, not granted and the High Court upheld the order of the trial court

It is then alleged that the applicant filed a reply to the application of Lala Chatter Sen on 18th May, 1951 and he asked that as a civil suit has been filed, the decision of the matter by the Regional Transport Authority should remain stayed so that there might not be investigations by two Tribunals at the same time On the

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21st of July 1951, the Regional Transport Authority nonetheless passed the following order

> Replacement of the vehicle given by Secretary, Regional Transport Authority, in favour of Babu Ram is not confirmed There is *prima facie* evidence to show that Babu Ram sold the vehicle and the permit in favour of Chatter Sen, which he had no right to do without the sanction of the Regional Transport Authority The vehicle and permit are suspended Issue notice under section 60 to Babu Ram to show cause why the permit be not cancelled Transfer application is postponed

On the 3rd of November 1951 the Regional Transport Authority again considered the matter and passed the following order

> The original permit was no 43 MT covering vehicle no 3167 It is established by deed dated 9th November 1949, that Babu Ram sold the vehicle and permit in favour of Lala Chatter Sen Chatter Sen has all along been in possession of that vehicle and has been running it Babu Ram could not sell the vehicle and the permit without obtaining the permission of the Regional Transport Authority Blanks to fill in number etc were only left in the deed dated 9th November, 1949 Babu Ram later wrote out an application addressed to the Regional Transport Authority that he has sold the vehicle and permit to Chatter Sen Babu Ram is not therefore entitled to retain the permit The permit no 183 is the successor of permit no 43 MT Permit no 183 is cancelled The question of transfer of permit does not arise as no permission for transfer was taken

From this order an appeal was preferred to the State Transport Authority Tribunal which by its order

dated 6th August, 1952, held that there was no ground to interfere with the decision of the Regional Transport Authority

In this last mentioned order the State Transport Authority Tribunal appeared to consider that the Regional Transport Authority had cancelled the permit no 133 under section 60(*d*) of the Motor Vehicles Act on the ground that the permanent permit was obtained by misrepresentation as the temporary permit had been sold when the permanent permit was applied for The Tribunal also observed that when the applicant had asked for replacement he was not in possession of the stage carriage no 3167 and that the Regional Transport Authority was entitled to cancel the permit also under section 60 (*c*) of the said Act

The order does not appear to determine whether the applicant was in possession of the stage carriage when he applied for the permanent permit

Learned counsel for the applicant contends that the permit could not be cancelled either under sub clause (*c*) or (*d*) of section 60

So far as section 60, sub clause (*c*) is concerned the submission of learned counsel for the applicant is that the applicant at no time ceased to possess the stage carriage no 3167 covered by the permit He urges that the State Transport Authority in its order, dated the 6th August 1952 has not stated the ground on which it came to the conclusion that the applicant was not in possession of the stage carriage no USL 3167 when he applied for replacement Attention is drawn by learned counsel to paragraph 17 of his present affidavit which runs as follows

> That subsequently Lala Chatter Sen financier, created trouble and tried to forcibly stop the running of the stage carriage no USL 3167, so the

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deponent applied on the 15th of January 1951, that as there was a dispute about carriage no USL 3167 he be allowed to replace the vehicle by vehicle no USL 3810 and the Regional Transport Officer was pleased to allow the replacement subject to confirmation by the Regional Transport Authority

Learned counsel for the applicant urges that this paragraph has not been controverted by any affidavit filed on behalf of the opposite parties, and so it must be taken that possession of the stage carriage no USL 3167 was still with him on the date of replacement He also urges that as sub section (c) of section 60 of the Motor Vehicles Act refers to the permit holder ceasing to possess the vehicle during the currency of the permit the documents which had passed between him and Chatter Sen all being prior to the grant of the permanent permit, these could not establish that the stage carriage no USL 3167 had ceased to be in his possession after the permanent permit had come into force, but if at all these documents might be used for establishing that he was not in possession of the stage coach when he applied for the permanent permit

Learned counsel then points out that no objection whatever was taken, when his application for the grant of a permanent permit was published in the *Gazette* by Lala Chatter Sen within the specified period, and urges that this established that the grant of a permanent permit could not have been opposed on the ground that the applicant was not possessed of the stage carriage no USL 3167 on the date of his application or was not the owner of the temporary permit to ply it Learned counsel urges that there was no evidence before the Regional Transport Authority apart from the documents to show that Chatter Sen had all along been in

possession of the stage carriage and had been running it since the 9th of November, 1949. He points out that the documents being merely by way of collateral security and not being intended to be acted upon could not in law transfer the permit or the stage carriage back to Chatter Sen nor did they show that Chatter Sen took possession of the said stage carriage on or after 29th October 1949 the alleged date of retransfer.

Learned counsel urges that there is no evidence to show that the applicant had obtained the permit fraudulently or by misrepresenting that he was possessed of stage carriage no. USL 3167. He has invited the Court's attention to the application form P. St. S. A. which is to be made under rule 50(a) (ii) of the U. P. Motor Vehicles Rules 1940 and submits that fraud or misrepresentation could only arise in respect of the particulars to be entered either in clause 10 or 14 of the application form. So far as clause 10 is concerned it requires particulars of any stage carriage permit valid in the province held by the applicant on the date of application. It is urged that in view of section 59 sub clause (1) of the Motor Vehicles Act 1939 even if it be taken that the applicant had in fact transferred the temporary permit to Lala Chatter Sen on 29th September 1949 in law that transfer was inoperative and therefore there could be no fraud or misrepresentation in the applicant stating that he held a temporary permit valid in the province on the date of his application.

It is urged that under clause 14 of the said application form, the applicant was only required to state whether he was then in possession of a vehicle available for use under the permit applied for. Learned counsel states that it has not been shown that on that

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day he was not in possession of the stage carriage no USL 3167 and that he could not have used the same under the permit applied for Learned counsel urges that the fact that Lala Chatter Sen did not intimate under section 31 that the ownership of the stage carriage no USL 3167 had been transferred to him by the applicant on 29th October, 1949 clearly shows that there was neither transfer of ownership nor of possession under the documents, and he points out that there was no evidence before the transport authorities of the handing back of possession of the stage carriage under the said documents by the applicant to Lala Chatter Sen

The submission of learned counsel thus is that in cancelling the permit, the authorities concerned have exceeded or acted illegally in exercising the jurisdiction vested in them under section 60 sub clause (*c*) and (*d*) of the Motor Vehicles Act

Learned counsel for the State argues that the Regional Transport Authority, in its order, dated 3rd November, 1951 has stated that it was established by the deed, dated 9th November, 1949 that Chatter Sen and not the applicant had all along been in possession of the stage carriage no USL 3167 and had been running it and that, therefore, it cannot be said that that Authority had acted beyond its jurisdiction in cancelling the permit on the ground of misrepresentation He urges that it is not open to this Court to examine the correctness of the finding that Chatter Sen had all along been in possession of the stage carriage no USL 3167 and had been running it and urges that it could not be said that there had been an excessive exercise of jurisdiction under section 60 of the Motor Vehicles Act Attention has been drawn by the learned counsel for the State to the case of G *Veerapada Pillai Raman* v *Raman and Raman Ltd* (1) In that case it was laid down that the

(1) A I R 1952 S C 192

grant of a permit is entirely within the discretion of the transport authorities and naturally depends on several circumstances which have to be taken into account It was held in that case that the Motor Vehicles Act is a statute which creates new rights and liabilities and prescribes an elaborate procedure for their regulation and that no one is entitled to a permit as of right even if he satisfies all the prescribed conditions that there is of permits providing what matters are to be taken into of permits providing what matters are to be taken into consideration as relevant and prescribing appeals and revisions from subordinate bodies to higher authorities and that the remedies for the redress of grievances or the correction of errors are found in the statute itself and it is to these remedies that resort must generally be had It was further held that such writs as are referred to in Article 226 are obviously intended to enable the High Court to issue them in grave cases where the subordinate tribunals or bodies or officers act wholly without jurisdiction, or in excess of it or on violation of the principles of natural justice, or refuse to exercise a jurisdiction vested in them or there *is an error apparent on the* face of the record and such act omission, error or excess has resulted in manifest injustice It was held that, however, extensive the jurisdiction may be, it seems that it is not so wide or large as to enable the High Court to convert itself into a court of appeal and examine the correctness of the decisions impugned and decide what is the proper view to be taken or the order to be made

In the end, the Supreme Court was of the view that that was not a fit case for interference with the discretion that was exercised by the Transport Authorities paying regard to all the facts and the surrounding circumstances

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In *Ebrahim Abbobakar v. Custodian General of Evacuee Property* (1) cited by the State Counsel it was pointed out that

> A writ of *certiorari* cannot be granted to quash the decision of an inferior court within its jurisdiction on the ground that the decision is wrong. It must be shown before such a writ is issued that the authority which passed the order acted without jurisdiction or in excess of it or in violation of the principles of natural justice. Once it is held that the court has jurisdiction but while exercising it, it made a mistake, the wronged party can only take the course prescribed by law for setting matters right inasmuch as a court has jurisdiction to decide rightly as well as wrongly.

On the other hand, learned counsel for the applicant has referred to the case of *R. v. Northumberland Compensation Appeal Tribunal* (2) SINGLETON J. therein observed:

> Error on the face of the proceedings has always been recognized as note of the grounds for the issue of an order of *certiorari*. I can find no authority for saying that in this respect there is any distinction to be drawn between proceedings of a criminal nature and civil proceedings.

His Lordship further observed as under:

> The decision of the tribunal was a speaking order in the sense in which that term has been used. The court is entitled to examine it, and if there be error on the face of it, to quash it; not to substitute another order in its place, but to remove that order out of the way as one which should not be used to the detriment of any of the subjects of His Majesty."

(1) A. I. R. 1952 S. C. 319. (2) [1952] 1 All. E. R. 102.

Again SINGLETON, L J observed

After all, it is the function of the courts to determine questions of law Tribunals are sometimes given an unduly difficult task There must be a feeling of dissatisfaction if it is recognized that a decision of a tribunal is wrong in law and yet there is no power to correct it—in other words if there is no right to obtain the opinion of the court I am satisfied that the course I have suggested would result in a saving of time, and of expense and would be for the public good

DENNING L J observed

We have here a simple case of error of law by a tribunal an error which they frankly acknowledge It is an error which deprives the applicant of the compensation to which he is by law entitled So long as the erroneous decision stands the compensating authority will not pay him the money to which he is entitled lest the auditor should surcharge them It would be quite intolerable if, in such a case there were no means of correcting the error The authorities to which I have referred amply show that the King's Bench can correct it by *certiorari* I am clearly of opinion that an error admitted openly in the face of the court can be corrected by *certiorari* as well as an error that appears on the face of the record

MORRIS, L J has observed

It is plain that *certiorari* will not issue as the Cloak of an appeal in disguise It does not lie in order to bring up an order or decision for rehearing of the issue raised in the proceedings It exists to correct error of law where revealed on the face of an order or decision or irregularity or absence of, or excess of jurisdiction where shown

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MORRIS, L J further observed

> It was further said that, though these grounds were formerly wide enough to include cases where decisions were on the face of them bad in law, there has in recent years been a contraction with the result that *certiorari* no longer lies for such reason It is said that this basis for the exercise of the controlling power has fallen into abeyance I can find no justification for this contention

It was suggested that the decision in the case of *G Veerappa Pillai* v *Raman and Raman Ltd* (1) could not be said to be in accord with the view expressed in *R* v *Northumberland Compensation Appeal Tribunal* (2) and ruled out the correction of legal errors apparent on the face of the record

It is not evident that this judgment of the Supreme Court has the effect of laying down that even where there is an error apparent on the face of the record which goes to the root of jurisdiction such an error may not be corrected In this connection it is necessary to quote the following passage from the judgment of their Lordship of the Supreme Court

> It is unnecessary for the disposal of this appeal to consider and decide on the exact scope and extent of the jurisdiction of the High Court Article 226 whether the writs it can issue must be analogous to the writs of *habeas corpus, mandamus,* prohibition, *quo warranto* and *certiorari*' specified therein and the power is subject to all the limitations, or restrictions imposed on the exercise of this jurisdiction, or where the High Court is at liberty to issue any suitable directions or orders or writs untrammelled by any conditions whenever the interests of

(1) A I R 1952 S C 192 (2) [1949] 1 All E R 122

justice so require, is large and somewhat difficult problem which does not arise for solution now

If the guiding principles in regard to the exercise of jurisdiction under Article 226 may be taken from the reported English cases, there seems no reason why the latest accepted position in England should not be considered as applicable in India also and there is nothing in the Supreme Court judgment referred to above which suggests that an error on the face of the record going to the root of jurisdiction may not be corrected Moreover the language of Article 226 has to be kept in view

Considering the growth of Departmental tribunals in this country, it seems, unless there is anything clearly to the contrary in the Constitution itself or in any case of the Supreme Court that the writ jurisdiction may in a fit case be used for the purpose of not only keeping inferior tribunals within then jurisdiction but seeing that they observe the law

In the light of these remarks the contentions of learned counsel may now be examined

To take up section 60 sub section (c) of the Motor Vehicles Act in the first instance the language of this sub section clearly indicates that the possession must cease in respect of the vehicle covered by the permit In other words it means that possession must have ceased within the duration of the permit

The case before the Regional Transport Authority seems to have been that there was no possession at all even at the date of the making of the application for a permanent permit for the applicant s possession had come to an end on or about 29th October, 1949 when the documents passed It was not the case that the applicant s possession ceased during the currency of

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the licence nor is there any evidence to suggest that the applicant was dispossessed just prior to his applying for replacement It would appear, therefore, that section 60, sub section (c) would not apply at all

So far as section 60, sub clause (d) is concerned in law there could be no fraud or misrepresentation in stating that the applicant held a temporary permit valid in the province, under clause 10 of the application form, since despite the documents passing in law there could not have been a valid transfer of permit because of the prohibition under section 59 sub-clause (1) of the Motor Vehicles Act even assuming that the documents were intended to be acted upon

So far as possession of the stage carriage no USL 3167 on the date of the application for a permanent permit is concerned the finding of the Regional Transport Authority that there was no possession at all on the date of application appears to have been arrived at on the basis of the documents executed by the applicant It is not stated that there was any oral evidence of actual handing over of possession to and of subsequent possession by Chatter Sen The inference that Chatter Sen had all along been in possession appears to have been drawn from the documents purporting to transfer the stage carriage The power of attorney which recites that the ownership is with the applicant, is difficult to reconcile with the document of transfer to Chatter Sen Under the circumstances no inference from the documents regarding possession could be drawn one way or the other No oral evidence is indicated in the order from which it could be found that the power of attorney had been acted upon The recitals, by themselves in the power of attorney do not indicate the actual handing over of possession The contents of the application made by Chatter Sen on 30th

January, 1951 to the Regional Transport Authority clearly indicate that Chatter Sen did not have possession of the stage carriage when he made that application The nature of this application does not appear to have been kept in view by the Regional Transport Authority in arriving at its decision

Under the circumstances it would appear that there is an error on the face of the record caused by a non reading and misreading of the relevant material and a failure to draw correct legal inferences from the facts which were before the Regional Transport Authority The State Transport Authority Tribunal appears to accept the reasoning and conclusion of the Regional Transport Authority on the question of possession

Under the circumstances it cannot be said that it has been established that on the date when the application for a permanent permit was made the possession of the stage carriage had re passed from the applicant to Chatter Sen or his son It has been laid down in *Veerappa Pillai v Raman and Raman Ltd* (1) that the question which has to be considered in a case like this is not whether legal title to the stage carriage has passed, but who is in possession of it and that the right to obtain a permit depends upon the possession and not owner ship

For the reasons stated above it would appear that the petitioner is in this case, entitled to relief and that a writ in the nature of *certiorari* should issue quashing the orders of the Regional Transport Authority dated the 21st July and the 3rd November 1951 and the order of the State Transport Authority Tribunal dated the 6th of August 1952

So far as the second of the petitioner's prayers is concerned, it would appear that the correct order to pass is

(1) A I R 1952 S C 192

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to direct the State Transport Authority Tribunal to consider the petitioner's application for the replacement of stage carriage no USL 3167 by stage carriage no USL 3810 on the merits

In my view, this writ application should succeed in the manner indicated above, and costs should be awarded to the petitioner and I order accordingly

BY THE COURT—A writ of *certiorari* will issue to quash the orders of the Regional Transport Authority, dated the 21st July and the 3rd November, 1951 and the order of the State Transport Tribunal, dated the 6th August, 1952

The State Transport Tribunal will proceed to consider the petitioner's application for replacement of vehicle no USL 3167 by vehicle no USL 3810 on its merits The petitioner is entitled to his costs which we fix at Rs 200

Order accordingly

CRIMINAL REVISION

Before Mr Justice Mootham, on a difference of opinion Between Mr Justice Harish Chandra and Mr Justice Bhargava

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Code of Criminal Procedure, 1898 *ss* 177 179—*Goods entrusted in Rajasthan—Goods sent to Aligarh—Misappropriation—Complaint where to be filed—Jurisdiction if at Aligarh—Indian Penal Code* 1860 *s* 405 *applicability of —Evidence, want of*

Where it was alleged in a complaint that the complainant purchased 246 bags of coriander from the accused at Baran in Rajasthan that he asked the accused to send 100 bags to Agra and the remaining 146 bags to him at Aligarh and the dispute related only to 146 bags as 100 bags were delivered at Agra and the statement made by the complainant at the time of filing the complaint was as follows the accused persons out of dishonest motive did not send the bags of *dhaniya*

Held (*Per* MOOTHAM and BHARGAVA JJ HARISH CHANDRA J *contra*)—that in view of s 177 of the Criminal Procedure Code the misappropriation occurred at the place where alleged entrustment was made namely at Baaran and as such the court at Aligarh had no jurisdiction

Held, further that there being no evidence on record to prove that more than 100 bags were actually purchased by the complainant there could have been no entrustment with regard to 146 bags in dispute within the meaning of s 400 Indian Penal Code and thus no offence of criminal breach of trust was committed

Criminal Revision No 1860 of 1951, from an order of Raghunandan Saran, Sessions Judge of Aligarh dated the 29th September 1951

The facts appear in the judgment

P C Chaturvedi and *A Banerji* for the applicant

Krishna Shanker for the opposite party

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[This application for revision first came up for hearing before HARISH CHANDRA and BHARGAVA, JJ., who differed in their opinion. Thereafter the case was laid up before MOOTHAM, J., who agreed with BHARGAVA, J. The case for final orders came up before DAYAL and ASTHANA, JJ., who allowed the revision and quashed the proceedings.]

HARISH CHANDRA, J.:—The facts of the case are fully stated in the judgment of my brother V. BHARGAVA, J., however differ from him on both the points. Section 405 which defines criminal breach of trust is reproduced below:

> Whoever, being in any manner entrusted with property or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".

The present complaint comes within the second part of the section and as I read the complaint, the complainant's case seems to be that the accused dishonestly used or disposed of the property which had been entrusted or disposed of the property which had been entrusted they would send 146 bags of *dhania* to Aligarh. The complainant, no doubt, does not point out, nor was it necessary for him to point out, the exact manner in which the accused had used or disposed of the property. In his statement, which was recorded under section 200 of the Code of Criminal Procedure, I find nothing which may be regarded as contrary to the allegations contained in the complaint. He clearly states that he had purchased the bags, paid Rs. 500 in advance to the accused

by way of security and made a settlement with them that they would send 100 bags to Agra and the remaining 146 bags to Aligarh They despatched bags of *dhania* to Agra and adjusted the price, but did not send 146 bags to Aligarh When they demanded the bags they refused to send them to him out of dishonest motive He had some correspondence with them and the accused persons denied that he had purchased 246 bags of *dhania* at all In the statement which he made in court he reiterated the same facts and stated that in one of his replies Chandu Lal accused stated that not more than 100 bags had been purchased for him One of the accused was not present in person and an evasive reply was given on his behalf by his counsel The other accused Sanwal Das was present in person but denied all knowledge of the transaction They thus gave no explanation with respect to the facts as alleged by the complainant in his complaint and subsequent statements In my view a *prima facie* case under section 406 of the Indian Penal Code was made out against the accused persons and the Magistrate rightly framed a charge against them under that section No doubt the charge is slightly defective inasmuch as it does not clearly bring out the fact that the property namely 146 bags of *dhania* had been entrusted to the accused persons and that they dishonestly used or disposed of that property in violation of the terms of the contract which required that those bags should be sent to Aligarh The words actually used in the charge are "dishonestly kept the same with you The intention however is clear It will be open to the Magistrate to amend the charge so that it may correspond with the language used in section 405 of the Indian Penal Code

In regard to the question of jurisdiction, my learned brother rightly points out that according to the Full

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Bench case, *Kashi Ram Mehta* v. *Emperor* (1) it is only when the consequence is a necessary ingredient of the offence that section 179 applies and a case can be inquired or tried by a court within the local limits of whose jurisdiction any such consequence has ensued. It will, however, appear that in an offence falling under the second part of section 405 the consequence namely the violation of any direction of law prescribing the mode in which such trust is to be discharged or of any legal contract, express or implied which he has made touching the discharge of such trust is a necessary ingredient of the offence and in this view of the matter, the courts at Aligarh have in my view, jurisdiction to try the case. This view is supported by the Division Bench case of *Mohru Lal* v. *Emperor* (2). It will be noted that one of the judges who decided *Mohru Lal's* case namely SULAIMAN, C.J. was also a member of the Full Bench which decided the earlier case of *Kashi Ram Mehta* v. *Emperor* (1). The facts of this case were somewhat similar to the facts of the present case. The accused Mohru Lal as an agent of a Kanpur firm was alleged to have gone to different places and collected monies on behalf of the firm. But he failed to remit them to the firm at Kanpur. It was held that the courts at Kanpur had jurisdiction to try the case. With all respect I agree with the view expressed in that case. In this case the allegation is that the accused were entrusted with the bags of *dhania* on the express condition that they would send 100 bags to Agra and the rest to Aligarh. They sent the 100 bags to Agra but did not send the remaining 146 bags to Aligarh. The allegation is that they dishonestly used or disposed of those 146 bags and the statement contained in one of their letters to the complainant that he had not purchased

(1) [1934] I. L. R. 56 All. 1047. (2) I. L. R. [1933] All. 644.

the 146 bags at all and then failure in the statements made by them in court go to support *prima facie* the complainant's allegation that they dishonestly used or disposed of those 146 bags of *dhania* in violation of the legal contract mentioned above. The complainant could not be expected to know how exactly he used or disposed of the bags and it was enough for him to state the fact that he had not fulfilled the contract and to indicate the circumstances from which it appeared *prima facie* that he had dishonestly used or disposed of them in violation of the said contract. A *prima facie* case under section 406 of the Indian Penal Code is made out against them which in view of the law laid down in *Mohan Lal's* case can be tried at Aligarh.

I would therefore, dismiss the revision and discharge the order staying further proceedings in the case.

BHARGAVA, J.:—This application for revision has been filed by one Sanwal Das, proprietor of Ram Shanti lal Sakalchand and his *munib* Chandu Lal residents of Baran, district Kota in Rajasthan.

A complaint was filed against both these applicants by Lala Narain Das opposite party in the court of a Magistrate at Aligarh alleging that the applicants had committed an offence punishable under section 406 of the Indian Penal Code. The complainant's case was that he was carrying on business at Aligarh and on *Baisakh Sudi* 5, Sambat 2007, he went to the applicants at Baran and through their commission agency purchased 200 bags of *dhania* (coriander) from the firm of the applicants. He further purchased 46 bags of *dhania* from other dealers in the market at the same place and entrusted the entire stock of 246 bags to the applicants. He paid a sum of Rs. 500 as advance to the applicants and entered into an arrangement that 100 out of 246 bags were to be sent to Agra and remaining 146 bags

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to Aligarh The complainant then returned to Aligarh After some time, 100 bags were despatched by the applicants to Agra and the price of those 100 bags of *dhania* was realised, but the remaining 146 bags were not sent to Aligarh The case of the complainant was that those 146 bags contrary to the instructions of the complainant, were dishonestly brought in use by the applicants for their benefit and that the applicants totally refused to give accounts to the complainant On receipt of this complaint the learned Magistrate recorded the statement of the complainant under section 200 of the Code of Criminal Procedure and then summoned both the applicants The trial started and, during the trial the complainant examined himself as a witness and further produced one more witness Munshi Lal Thereafter the statements of the two applicants were recorded and then the learned Magistrate framed a charge against both the applicants In the charge the learned Magistrate gave details of the contract that had been entered into by the complainant with the two applicants and thereafter proceeded to say

> You were asked to send 100 bags to the complainant at Agra and 146 bags to his firm at Aligarh but you did not send 146 bags up to this time and have dishonestly kept the same with you and thereby committed an offence punishable under section 406 of the Indian Penal Code

After this charge had been framed, the applicants moved the learned Sessions Judge of Aligarh to quash the proceedings and to discharge them in exercise of his powers of revision The learned Sessions Judge rejected this application and consequently the applicants have now come up to this Court in this revision

Two principal grounds have been urged in support of this revision One ground is that, even if the whole

evidence given on behalf of the prosecution be taken into account no case is made out indicating that any offence had been committed by either of the two applicants so that no charge should have been framed and the applicants should have been discharged The second ground is that the learned Magistrate at Aligarh had no jurisdiction to try the applicants in view of the provisions of the Code of Criminal Procedure and consequently the proceedings were liable to be quashed

During the course of arguments in this revision we were taken through the complaint and the entire evidence which had been recorded by the learned Magistrate and on the basis of which he framed the charge against the applicants In the complaint the allegation was that 246 bags of *dhania* had been *entrusted* by the complainant to these two applicants of which 100 bags were despatched to Agra in accordance with the instructions of the complainant but 146 bags were dishonestly brought in use by them for their own benefit and that the applicants totally refused to give accounts to the complainant In his statement in court the complainant did not fully support this version given by him in the complaint though he stated that he had instructed the applicants to send the remaining 146 bags to Aligarh on the booking for Aligarh being opened and that the applicants had detained the goods and had not sent them There was no statement that the goods had been brought by the applicants in their use, or that the applicants had refused to render any accounts He further proved certain correspondence which had taken place between him and the firm of the applicants He proved the invoice Ex P 1 This invoice related to purchases of 100 bags of *dhania* only Forty six out of these 100 bags were purchased from other dealers in the market whereas the remaining 54 bags were purchased from the

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firm of the applicants. The invoice was sent which these 100 bags of *dhania* were sent to Agra and in this invoice the sum of Rs 500 which had been paid as advance was set off towards the amount due. The complainant admitted that the accounts of these 100 bags were completely settled and the advance of Rs 500 which he had given to the applicants was adjusted in those accounts. No invoice has been produced for the remaining 146 bags which the complainant claimed he had further purchased from the applicants. Then there is a letter from the applicants firm dated the 15th of May 1950 in which the complainant was informed that for the remaining 146 bags the complainant had neither sent a deposit nor had he arranged that the goods be weighed and consequently the order for those 146 bags was to be treated as cancelled. Thereupon the complainant says that he sent a registered letter to the firm of the applicants and in reply he received a letter Ex. P 8. In this reply the complainant was informed that 246 bags were never purchased by the complainant in the firm of the applicants and that only 100 bags had been purchased. This letter was dated the 27th of May 1950. After the receipt of this letter the complainant filed his complaint on the 27th of June 1950. Thus the case of the applicants is that the actual purchase which had been finalised was in respect of 100 bags only and the advance deposit of Rs 500 also related to the purchase of these 100 bags. The transaction with regard to the remaining 146 bags was never completed so as to result in actual transfer of ownership in those bags to the complainant. It was argued that the fact that the advance of the sum of Rs 500 which was deposited on the date the transaction by the complainant was adjusted completely in the accounts relating to those 100 bags clearly shows that the transaction which had

been completed related to no more than 100 bags It was for this reason that the applicants demanded a further deposit from the complainant It was also argued that only 100 bags had been weighed in the presence of the complainant at the time of the initial contract and there had been no weighment of 146 bags This was admitted by the complainant but the complainant came forward with the plea that the weighment of those 146 bags was postponed simply for the purpose of avoiding additional expenditure as the applicants had told him that the bags could be weighed at the railway station when being despatched to Aligarh I do not think that this explanation of the complainant can be accepted If expenditure was to be avoided by having only one single weighment instead of two weighments there is no reason why the first 100 bags or at least the first 54 bags purchased by the complainant from the applicants firm should have been weighed when the complainant went to place the order as all those bags were also surely to be weighed again at the railway station when being booked for Agra This correspondence which has all been produced by the complainant himself clearly shows that in fact the transaction of purchase of the further 146 bags alleged by the complainant had not been completed and property in those bags had not passed to the complainant from the applicants The complainant had only placed a provisional order and it was for this reason that the applicants firm wrote to the complainant to send a deposit in respect of those 146 bags and to send a man to have them weighed When the complainant failed to comply the applicants firm cancelled the contract The complainant persisted in making a demand for those 146 bags without agreeing to make a deposit or to send a man to have those bags weighed and thereupon the applicants' firm wrote that the initial purchase had been in respect

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of 100 bags only and that there had never been any contract under which 246 bags of *dhania* had been purchased by the complainant from the applicants' firm.

The evidence of Munshi Lal shows that soon after the initial agreement had been entered into between the parties the rates of *dhania* went up and it was when the rates shot up that the complainant wanted the order for 146 bags to be treated as a sale which had already been completed so as to be able to get those 146 bags at the lower rate which was prevailing when the complainant had gone to Baran for the initial contract.

The evidence of the complainant and Munshi Lal taken together with the statements of the two applicants thus clearly indicates that this is a case where the dispute between the parties was of a purely civil nature. The complainant came forward with the case that there had been a complete contract of purchase under which ownership in a further 146 bags had passed to him and these bags were entrusted to the applicants to be sent to Aligarh. On the other hand the case of the applicants was that the contract had been completed only in respect of 100 bags whereas in respect of the remaining 146 bags there was only a provisional order placed by the complainant with the firm of the applicants. The circumstance that a deposit of Rs 500 only was made by the complainant and that this deposit was adjusted when there was a final accounting with regard to 100 bags sent to Agra clearly points to the correctness of the case set forth by the applicants. In any case the entire evidence given on behalf of the prosecution merely shows that there is a dispute between the parties about the terms of the contract and there is no question of any dishonest appropriation or use by the applicants of the property belonging to the complainant. In this connection it is significant to note that in his statement

on oath in court when giving evidence, the complainant did not make any statement at all that 146 bags belonging to him had been misappropriated by the applicants or converted by them to their use. There was not even a statement as had been alleged in the complaint that the applicants had brought those 146 bags into their use for their benefit. All that the complainant stated was that the applicants detained the goods and did not send them as a result of which the complainant had sustained a loss of more than ten thousand rupees. On the face of it the facts deposed to by the complainant in his evidence in the trial court did not make out any *prima facie* case at all of criminal breach of trust. The criminal breach of trust as defined in section 405 of the Indian Penal Code is constituted only when the person charged with committing it dishonestly misappropriates or converts to his own use the property entrusted to him or uses or disposes of the property in violation of any contract or any provision of law. In this case the complainant's evidence does not go to the extent of proving that 146 bags which he alleged he had entrusted to the applicants had either been misappropriated by the applicants or converted to their use, nor did he state that those bags were dishonestly brought in use or disposed of by the applicants. Certainly there was violation of contract between the parties if it be believed that there had been a contract under which 146 bags had already been purchased by the complainant and the applicants had agreed to send those bags to Aligarh. It is not every violation of a contract that constitutes criminal breach of trust. An offence of criminal breach of trust requires three important ingredients:

(1) There should be entrustment of property;

(2) the property should have been misappropriated or converted to use or used or disposed of in violation of the contract; and

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(3) this should have been done dishonestly

In the present case the evidence given on behalf of the prosecution does not go to the extent to proving that there was any misappropriation or conversion to use or use or disposal of the bags by the complainant Consequently even if the entire prosecution evidence be believed the facts proved do not constitute an offence of criminal breach of trust Accepting the prosecution evidence all that can be held is that there had been a violation of the contract by the detention of the goods and by not sending them to Aligarh but there is no reason to infer that the detention of goods and failure to send them to Aligarh necessarily implied that the bags had been used or disposed of by the applicants In fact when the applicants were examined in court they expressed readiness to send the bags under proper conditions The applicants even went to the extent of offering to compensate the complainant for any damages that might be found due on rendition of accounts This willingness to meet the civil liability for damages for breach of contract if any had taken place clearly indicates that this criminal complaint was brought by the complainant merely to bring pressure on the applicants and that the applicants had never committed any acts which would constitute the offence of criminal breach of trust On merits therefore there were no sufficient grounds for the magistrate to frame a charge against the applicants for having committed the offence of criminal breach of trust punishable under section 406 of the Indian Penal Code It may be noticed in this connection that even in the charge all that the magistrate has stated is that the applicants dishonestly kept the bags with them and thereby committed the offence punishable under section 406 of the Indian Penal Code Even the magistrate did not feel that from the mere

fact that the applicants had kept the bags with them an inference followed that the applicants had used or disposed of the bags I do not think that any such inference can reasonably be drawn The complaint in this case was a misconceived remedy on the part of the complainant who should have sought to redress in the civil court by bringing a suit for specific performance of contract or in the alternative for damages

Even on the second ground I am of the opinion that the applicants must succeed and it must be held that the courts at Aligarh had no jurisdiction to try this case Section 177 of the Code of Criminal Procedure lays down that—

> every offence shall ordinarily be inquired into and tried by a Court within the local limits of whose jurisdiction it was committed

The facts as alleged in the complaint clearly showed that the offence of criminal breach of trust with which the applicants were charged was committed entirely at Baaran in Rajasthan and not at Aligarh The complainant's own allegation was that 146 bags which the applicants did not send to the complainant and had used for their own benefit were entrusted to the applicants at Baaran The only duty of the applicants was to despatch them from Baaran by rail when the booking for Aligarh opened There was no suggestion at all that those bags were ever brought to Aligarh or that the applicants brought them in their use at Aligarh The trend of the complaint shows that according to the complainant the act of bringing those 146 bags into their use for their own benefit committed by the applicants must have been committed at Baaran if at all and not at Aligarh All the acts constituting the offence as well as the entrustment of the property were consequently done outside the jurisdiction of the

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Aligarh courts and, under section 177 of the Code of Criminal Procedure, the case should have been tried ordinarily by the courts having jurisdiction in Baran. Sub-section (2) of section 181 of the Code of Criminal Procedure is of no assistance to the complainant. The complaint clearly shows that the property in respect of which criminal breach of trust was alleged was received and retained by the applicants at Baran and not at Aligarh. On behalf of the prosecution reliance was placed on section 179 of the Code of Criminal Procedure to support the proposition that this case could be tried by the courts at Aligarh. Section 179 lays down:

> 179. When a person is accused of the commission of any offence by reason of anything which has been done and of any consequence which has ensued, such offence may be inquired into or tried by a court within the local limits of whose jurisdiction any such thing has been done or any such consequence has ensued.

In this case the applicants were accused of the commission of the offence of criminal breach of trust by reason of their having dishonestly brought to use those 146 bags for their own benefit. The charge against them was consequently based on their act of bringing the bags into their own use and this act, as I have said above, was never alleged to have been committed in Aligarh. If committed at all, it was only committed at Baran. The mere fact that the complainant suffered loss at Aligarh because the bags were not sent to him there would not make section 179 of the Code of Criminal Procedure applicable. The consequence mentioned in section 179 of the Code of Criminal Procedure means only such consequence as is a necessary ingredient of an offence which is to be tried. In

the present case the loss of the complainant was not a necessary ingredient of the offence of criminal breach of trust. The allegation that the bags had been dishonestly brought in use by the applicants for their own benefit was sufficient to complete the offence of criminal breach of trust. Their failure to send the goods to Aligarh, their failure to refuse to give accounts to the complainant and the consequential loss to the complainant were none of those consequences necessary to constitute the offence of criminal breach of trust. Section 179 of the Code of Criminal Procedure is only applicable where the act committed by the accused does not by itself constitute an offence and the offence is only completed as a result of the act combined with the consequence which has ensued as a result of the act which is not the case made out in the complaint. This view is fully supported by a Full Bench of this court in *Kashi Ram Mehta* v. *Emperor* (1) where it was held:

> Another noteworthy fact is that the word "and" has been used instead of the word "or". Indeed if the doing of anything were in itself sufficient to constitute the offence contemplated in this section there would have been no occasion to use the expression "of any consequence which has ensued at the place at which it occurs" it would have been quite sufficient to mention it at the end of the section where it is already mentioned. If therefore the act done and the consequence which has ensued are to be taken as together amounting to the offence the commission of which is complained against then it necessarily follows that the consequence must be a necessary ingredient of the offence in order that section 179 be applicable. If the offence is complete in itself by reason of the act having been done and the conse-

(1) (1933) I. L. R. 56 All. 1047

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quence is a mere result of it which was not essential for the completion of the offence then section 179 would not be applicable

Learned Government Advocate relied on a decision by a Division Bench of this Court in *Mohan Lal* v *Emperor* (1) which was decided subsequent to the Full Bench case referred to above in support of his contention that to the facts of a case like the present section 179 of the Code of Criminal Procedure would be applicable SULAIMAN C J was a member of the Full Bench as well as of this division Bench The facts of the case of *Mohan Lal* v *Emperor* (1) were that Mohan Lal was engaged in Kanpur as an agent of the firm of Matadin Bhagwan Das Sugar Merchants of Kanpur and he was sent to Bengal with instructions to effect deliveries of sugar bags and to realise the price of goods from customers and either personally bring the proceeds to Kanpur or remit the money to Kanpur Mohan Lal did remit large sums to Kanpur the last date of such remittance being the 7th of December 1931 and subsequently he withheld moneys collected by him and embezzled them In the complaint the names of nine purchasers were given and the total amount paid by those purchasers was alleged to have been realised by Mohan Lal and embezzled by him The evidence showed that those sums of money had been realised by Mohan Lal It was further shown that Mohan Lal absconded and could not be traced No evidence was given on behalf of the complainant nor was any allegation made that Mohan Lal had actually misappropriated or converted to his own use that money by any positive act The allegation of the complainant was that Mohan Lal had collected the money and had failed to send it to Kanpur within a reasonable time It was also shown that

(1) I L R [1936] All 611

certain sums of money in question had been collected by Mohan Lal prior to his last remittance on the 7th of December 1934 and, therefore, the argument was that the accused (Mohan Lal) had misappropriated those sums of money. The learned Judges dealing with the case held that on those facts Mohan Lal was not being prosecuted under the first part of section 405 of the Indian Penal Code which deals with dishonest misappropriation or conversion of property. It was remarked:

> To charge a person under this part of the section there should be an allegation that at a particular time and place that person had dishonestly misappropriated or converted to his own use property which was entrusted to him. Now the second part of the section may be a negative part. It consists of dishonestly using or disposing of property in violation of—
>
> (a) any direction of law or
>
> (b) any legal contract touching the discharge of the trust.

Where there is a violation of a direction of law or a legal contract the proof of that violation may be by negative evidence that the direction of law or the contract has not been fulfilled. We are of opinion that where the direction of law or the contract requires that the accused should dispose of the property at a particular place then the court having jurisdiction at that place will have jurisdiction to try the offence of the second part of section 405 I. P. C. where there is a charge that the accused has failed to comply with the direction of law or the legal contract and has failed to carry out his duty at that place. The first part of section 405 will apply where it is known that the accused had dishonestly misappropriated or

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converted to his own use certain property at a particular place and the jurisdiction to try the accused will be at the place where this dishonest misappropriation or conversion has taken place. But where it is alleged that the accused has failed to account for the property then the second part of section 403, I. P. C. will apply and jurisdiction exists at the place where the property should have been delivered by the accused.

When concluding the case the learned Judges held as follows:

> On that view of the law in the present case the Magistrate at Kanpur had jurisdiction because the allegations in the complaint are that the accused withheld money collected by him and did not forward it to Kanpur. There is no charge that he misappropriated or converted to his own use the money at any particular place and his offence consists in failing to carry out his contract and remit the money or bring the money to Kanpur. He was guilty of an illegal omission. Section 43, I. P. C. lays down that a person is said to be legally bound to do whatever it is illegal in him to omit. He was legally bound to remit this money to Kanpur and he failed to do so. He therefore, committed an offence within the jurisdiction of the Magistrate in Kanpur by his illegal omission to send or bring the money to Kanpur.

In my opinion this case is not applicable to the facts of the case before me. In that case it was held that the magistrate in Kanpur had jurisdiction because the charge against the accused was based on an illegal omission in violation of a contract. In the case before me, the charge is not based on any illegal omission but on a

positive act In the complaint it was clearly alleged by the complainant that the applicants had dishonestly brought in use for their own benefit the goods entrusted to them This assertion of a positive act was by itself sufficient to constitute the offence of criminal breach of trust and there was no question of relying on any omission on the part of the applicants as being a necessary ingredient of the offence alleged against them The complaint did contain the allegation that the applicants had totally refused to give accounts to the complainant but this omission to render accounts was not in all a necessary ingredient of the offence of criminal breach of trust as alleged in the complaint The complaint contained in it an allegation of the positive act of bringing the goods in use and of the negative act of omitting to give accounts The positive act alleged was by itself sufficient to constitute an offence of criminal breach of trust whereas the negative act of omitting to render accounts did not on the allegation in the complaint constitute the offence of criminal breach of trust There was also the allegation of the omission to send the bags to Aligarh Mere failure to send the goods to Aligarh or to render accounts to the complainant could not in this case be held to complete the offence of criminal breach of trust If it could be held that the goods were still kept intact by the applicants with them at Baoran to be despatched to the complainant but the applicants did not send the goods to Aligarh and refused to render accounts to the complainant it could not be said that an offence of criminal breach of trust had been committed by the complainant The main distinguishing feature therefore is that in the present case the charge is based on the positive act of bringing the goods in use and not on any omission and consequently, the views expressed by the learned Judges in *Mohan Lal's* case cannot be applied to this case I may again

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reiterate, as has been said by me earlier that the offence of criminal breach of trust as defined in section 405 of the Indian Penal Code requires the commission of one of the four acts before the offence can be complete. These four acts are—

(1) dishonest misappropriation

(2) dishonest conversion to his own use by the person charged

(3) use of the property by the person entrusted with it for his own benefit and

(4) disposal of the property

The last two acts of bringing in use the goods for his own benefit or disposal of the property must be in violation of any direction of law or a legal contract. The omission to do certain acts might lead to an inference that one of these four acts had already been committed. The offence could however, be constituted not by the omission but by one of these four positive acts and it would always be open to courts to examine whether the commission of one of the four positive acts was rightly inferred from the omission. The omission would therefore be a circumstance and would not by itself constitute the offence. In this view I have felt some doubt about the correctness of the decision of the Division Bench in *Mohan Lal's* case as this aspect of the case does not appear to have been examined by the learned Judges. I do not however think that it is necessary for purposes of the decision of the present case to have that decision reconsidered because of my view that on the evidence given by the prosecution no *prima facie* case of commission of an offence of criminal breach of trust against the applicants is made out and that the facts of this case are distinguishable from the facts of that case so that the views expressed in that case are not applicable.

There was some argument before us whether the jurisdiction is to be determined by the allegations in the complaint or by the facts found by the Magistrate as indicated in the charge framed by him or by the facts which might be held by this Court to have been proved by the prosecution on the evidence given on their behalf A learned single Judge of this Court in the case of *Empress v Dawan Singh* (1) gave a decision indicating that the jurisdiction is to be determined on the facts given in the complaint and not on the facts as they appear subsequently during the trial of the case In *Sheo Shankar v Mohan Sarup* (2) a Full Bench of this Court held

> Now the question of jurisdiction must be decided at the outset by a perusal of the complaint It is on the terms of the complaint that the Magistrate first has to inform himself as to the nature of the case and see whether from the allegations made in the complaint it would appear that he had jurisdiction to entertain it

In *Emperor v Rich* (3) a learned single Judge of this Court held

> Coming to section 181 the learned Judge was correct in pointing out that jurisdiction must follow the complaint and not the final decision

It is because of the views expressed in these cases with which I see no reason to differ that I have considered the question of jurisdiction in the present case with reference to the facts given in the complaint alone If the question of jurisdiction be decided on the basis of the facts found by the Magistrate as inferred from the charge framed by him it is again clear that the Magistrate at Aligarh had no jurisdiction to try the case

(1) 1884 A W N 31 (2) A I R 1921 All 12
(3) (1930) I L R 52 All 604

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The charge only mentions that the applicants kept the goods with them, and thereby committed the offence punishable under section 406 of the Indian Penal Code The goods must have kept at Biruan and not at Aligarh Irrespective of the question whether the facts mentioned in the charge do or do not constitute the offence of criminal breach of trust, those facts cannot, in any case, indicate that any act was committed at Aligarh or that there was any consequence at Aligarh which was a necessary ingredient of the offence of criminal breach of trust Finally my view of the facts that can be held to be proved on the evidence given by the prosecution in this case, is that they do not constitute any offence involving an act committed at Aligarh In any aspect of the case, therefore the courts at Aligarh could have no jurisdiction to try this case

I would, consequently, allow this revision and quash the proceedings pending against the applicants in the courts at Aligarh

[As the Judges constituting the Bench were divided in opinion the case was laid before another Judge in accordance with section 378 of the Code of Criminal Procedure]

MOOTHAM, J —Section 177 of the Code of Criminal Procedure provides that every offence shall ordinarily be inquired into or tried by a court within the local limits of whose jurisdiction it was committed That general provision is supplemented by the sections which follow, and in particular by section 179 which provides that—

> When a person is accused of the commission of any offence by reason of anything which has been done and of any consequence which has ensued such offence may be inquired into or tried by a Court within the local limits of whose jurisdiction

any such thing has been done, or any such consequence has ensued

It is in my opinion settled, so far at least as this Court is concerned, that section 179 applies only when the offence in respect of which complaint is made comprises both the act done and the consequence which has ensued The consequence, in other words must be a necessary ingredient of the offence This was so held in the Full Bench case of *Kashi Ram Mehta* v *Emperor* (1)

The applicant is alleged to have committed criminal breach of trust, an offence which is committed when a person entrusted with property or with dominion over property either—

(*a*) dishonestly misappropriates or converts that property to his own use, or

(*b*) dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged or of any legal contract express or implied which he has made touching the discharge of such trust or wilfully suffers any other person to do so

In cases which fall in class (*a*) the offence is complete as soon as there is misappropriation or conversion with a dishonest intention The fact that the owner of the property has suffered or may suffer loss is not material, and the court which will have jurisdiction is the court within whose jurisdiction is the place where such misappropriation or conversion occurred If such misappropriation or conversion occurred in more than one place then under section 182 of the Code of Criminal Procedure more than one court will have jurisdiction In cases which fall in class (*b*) the offence is complete as soon as the person entrusted dishonestly uses or disposes of the property in violation of any direction of law relating to the discharge of the trust or of the

(1) (1934) I L R 56 All 1047

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contract which he has made concerning the discharge of such trust. In both classes of case it is, as was pointed out by SULAIMAN C.J., in *Kedar Ram Mehta's* case (1), a pure question of fact where or at what time, the offence was complete. The determination of this question in cases falling within class (*b*) may present difficulty, and each case will depend on its particular facts. If an agent is entrusted with goods for sale at Lucknow and is required under his contract to return the unsold goods and render an account to his principal at Allahabad his failure to do either may be the only evidence of his dishonest intention, in which case the offence may be inquired into either by the court at Lucknow [under section 181(2) of the Code of Criminal Procedure] or at Allahabad. Thus in *Mohan Lal* v. *Emperor* (2) where the accused had been sent by his employers at Kanpur to Bengal to effect deliveries of sugar bags to realise the price of goods from customers and then either to bring personally or to remit the proceeds to Kanpur and the only evidence against him was his failure either to bring or remit the sale proceeds to Kanpur it was held that it was that fact which evidence his dishonest intention and the Kanpur court had jurisdiction. The court cited with approval a passage from the case of *Paul de Flondor* v. *Emperor* (3), in which it was said:

> If there is evidence apart from the fact of non accounting to show where the misappropriation was committed, the venue must be laid either in that place or in the place where the property was received or retained. If there is no evidence to show where the misappropriation was committed other than the fact of non accounting then the venue may be laid in the place where the accused

(1) (1934) I. L. R. 56 All. 1017. (2) I. L. R. [1936] All. 644.
(3) (1936) I. L. R. 59 Cal. 93 at 100.

failed to account because that is where the offence was committed within the meaning of section 181. An illustration may, perhaps, clarify the position. X is entrusted in Calcutta with a book to deliver in Allahabad. The book is not delivered. If it is the prosecution case that X dishonestly sold the book in Calcutta thereby putting out of his power to discharge the trust the offence is complete and the Calcutta court alone will have jurisdiction to try X. If on the other hand there is no evidence to show where the misappropriation occurred, the proof of misappropriation depending solely on the failure of X to deliver the book in Allahabad, that fact is a necessary ingredient of the offence which can therefore be tried either at Calcutta or Allahabad.

In order to determine the question of jurisdiction the court will examine the complaint and such statement, if any, as made by the complainant when the complaint is filed. The complaint in the present case says that the complainant purchased 246 bags of coriander, that he asked the accused to send 100 bags to Agra and the remaining 146 bags to him at Aligarh. One hundred bags were duly delivered at Agra, the dispute relates to the remaining 146 bags. With regard to these the complaint says:

> The above goods, contrary to the instructions of the complainant, were dishonestly brought in use by them for their benefit and they have totally refused to give accounts to the complainant.

In his statement when the complaint was filed, the complainant said:

> The accused persons out of dishonest motive did not send the bags of "*dhonia*".

The inference, in my opinion, is clear. It is that the misappropriation occurred at the place where the alleged

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entrustment was made namely at Bharan in Rajputana I am of opinion, therefore that the court at Aligarh had no jurisdiction

The essence of the charge against the accused is that in violation of the trust reposed in them they did not send to Aligarh 146 bags which were given to them for this purpose I can however find no evidence of this entrustment With the assistance of counsel, I have examined the evidence and I am of the opinion that the complainant did not in fact purchase more than 100 bags So far as regards the remaining 146 bags it appears clear that all that the complainant had done was to enter into an agreement with the accused who carried on business as commission agents to purchase this quantity of bags through them at a future date There is no evidence whatever that more than the original 100 bags were actually purchased by the complainant Whether the failure to implement this contract was due to his default or that of the accused it is not for this Court to decide but I think it is clear that none of the 146 bags were in fact purchased by the complainant and that therefore there could have been no entrustment within the meaning of section 405 of the Indian Penal Code The dispute between the parties is in my view essentially one of a civil nature I agree therefore on both points with the conclusion reached by Mr Justice BHARGAVA and accordingly I would allow this application and set aside the orders of the court below

BY THE COURT—[*Per* DAYAL and ASTHANA JJ.]—In view of the opinion of the third Judge, this revision is allowed and the proceedings pending against the applicants in the court below are quashed

Revision allowed

CIVIL MISCELLANEOUS

Before Mr Justice Mootham and Mr Justice Sapru

MESSRS RAMESHWAR PRASAD KEDARNATH (APPLICANT)

v

THE DISTRICT MAGISTRATE KANPUR AND OTHERS (OPPOSITE PARTIES)

1953 September 3

Constitution of India, *Art 226—Licence of a cloth dealer cancelled by District Magistrate—Application for renewal of licence not heard and decided upon merits—Orders if administrative—Power of High Court to quash administrative orders*

The applicant carrying on business of cloth at A under the style of *RS* was granted a licence in Form BI under the Controlled Cotton Cloth and Yarn Dealers Licensing Order to buy and sell controlled cloth This licence was renewed twice and was ultimately to expire on the 31st October 1952 Before its expiry on the 9th May 1952 *RS* was served with a notice by the District Magistrate of A that his licence had been cancelled on account of the malpractices indulged in by him and his bad reputation but he was afforded no opportunity of making a representation or of being heard before passing either of the orders cancelling his licence or refusing to renew the licence

Upon an application for issue of a writ under Article 226 of the Constitution of India

Held that in spite of the act of the Licensing Authority in refusing to renew the licence of *RS* being an administrative act the order is quashed as High Court has power under Article 226 of the Constitution to issue direction and orders as well as writs for any purpose

Case law discussed

Civil Miscellaneous No 173 of 1953

The facts appear in the judgment

G S Pathak and *R S Pathak*, for the applicant

The Standing Counsel for the opposite parties

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MOOTHAM J.—This is a petition under Article 226 of the Constitution.

The petitioner carries on business as a cloth dealer at Kanpur under the style of Rameshwar Prasad Kedar Nath. In 1948 the U. P. Controlled Cotton Cloth and Yarn Dealers Licensing Order of that year came into operation and in 1949 the petitioner applied for and was granted a licence in Form B1 that is a licence to buy and sell controlled cloth valid up to the 31st October, 1950. The licence was renewed for two further periods each of one year.

On the 9th May 1952 the petitioner was informed by the District Magistrate of Kanpur, the first respondent, that his licence had been cancelled and from the order of cancellation made by the District Magistrate on the 1st May it appears that this action was taken on account of the alleged contravention by the petitioner of clause 24(1) of the Cotton Textile (Control) Order 1948. The operation of this order was subsequently stayed by an order of this Court.

On the 25th September 1952 the petitioner applied for a renewal of his licence which would in any event expire on the 31st October of that year. On the 1st December he was informed by the District Supply Officer that the District Magistrate had refused to renew the licence on account of the unfair practices indulged in by you and your bad reputation. This allegation is denied by the petitioner and it is common ground that he was not afforded any opportunity of making a representation or of being heard before either of the orders cancelling his licence or refusing to renew that licence was made.

The petitioner prays for the issue of a writ of *certiorari* or other order to quash the order of the District Magistrate refusing to renew his licence. The primary

pal submission made on his behalf is that the District Magistrate in determining whether his licence should be renewed was bound to hear the petitioner and afford him an opportunity of rebutting the allegations made against him. It is also contended that in his order refusing to renew the petitioner's licence the District Magistrate did not state the reasons therefor within the meaning of clause 11 of the U. P. Controlled Cotton Cloth and Yarn Dealers' Licensing Order 1948 that the order refusing to renew the licence was made *mala fide* and finally that clause 11 of the Order if it does not require the District Magistrate to give the person concerned a hearing before refusing to renew his licence is unreasonable and void as being in conflict with Article 14 of the Constitution.

Clause 11 of the Order is in the following terms:

> A licence granted under this Order shall unless previously cancelled or suspended be valid for 12 months from the date of issue but may on application made not less than one month before the expiry of the said period be renewed for a year at a time on payment of the fees prescribed in respect of such licence in Schedule II.
>
> Provided that the Licensing Authority may for reasons to be recorded in writing refuse to renew a licence.

The argument on behalf of the State is that the renewal or refusal to renew a licence is purely an administrative act and reliance is placed on the recent decision of the Privy Council in *Nakkuda Ali* v. *Jayratne* (1).

In a well known passage in his judgment in *The King* v. *The Electricity Commissioners* (2) ATKIN L. J. as he then was defined the conditions subject to which the

(1) L. R. [1950] A. C. 60. (2) L. R. [1924] 1 K. B. 171.

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Kings or Queens Bench in England could issue a writ of *certiorari* or prohibition He said at p 205

> Wherever any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially act in excess of their legal authority they are subject to the controlling jurisdiction of the Kings Bench Division exercised in these writs

It has not been contended by the State in this case that the refusal of the Licensing Authority to renew the petitioner's licence did not involve a question affecting the petitioner's rights, the argument was that in determining this question the Licensing Authority had no duty to act judicially The test it was urged was a comparatively simple one did the enactment which conferred authority on the Licensing Authority to determine whether the petitioner's licence should be renewed impose upon that authority either specifically or by necessary implication the duty to act judicially? If it did not then the act was ministerial In my opinion this argument, in view of the decision of the Supreme Court in *Advani's* case (1) must prevail In my opinion this argument in view of the decision of that case the Court had to consider the effect of section 8 of the Bombay Land Requisition Ordinance 1947 by which the Provincial Government was given power if in its opinion it was necessary or expedient to do so to requisition land for any public purpose By a majority the Court held that the decision of the Provincial Government that certain property was required for a public purpose was not a judicial or quasi judicial decision but an administrative act and that therefore the Bombay High Court had no jurisdiction to issue a writ of *certiorari* in respect of the order of requisition The Court approved as correctly having

(1) 1950 S C R 621

down the law, the passage from Lord Justice ATKIN's judgment in *The King* v. *The Electricity Commissioners* (1) to which I have referred and all the learned Judges who constituted the majority, took the view that as there was nothing to be found in the Ordinance which required the Provincial Government to act judicially in deciding whether the property in dispute was required for a public purpose the Provincial Government acted in an administrative capacity. KANIA C. J. (with whom PATANJALI SASTRI J. as he then was agreed) said at page 638:

> It seems to me that the true position is that when the law under which the authority is making a decision itself requires a judicial approach, the decision will be quasi judicial.

and DAS, J. said (at p. 725):

> If a statutory authority has power to do any act which will prejudicially affect the subject then, although there are not two parties apart from the authority and the contest is between the authority proposing to do the act and the subject opposing it, the final determination of the authority will yet be a quasi judicial act provided the authority is required by the statute to act judicially.

It is therefore, necessary in the first place to examine the U. P. Controlled Cotton Cloth and Yarn Dealers' Licensing Order. It is common ground that there is nothing in the Order which expressly or by necessary implication imposes the duty on the Licensing Authority to act judicially unless it is to be found in the requirement contained in the proviso to clause 11 that if the Licensing Authority refuses to renew a licence he must record his reasons therefor in writing. It is also common ground that there is nothing in the Order

(1) L. R. [1924] 1 K. B. 171

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which plainly indicates the intention of the legislature that the exercise by the Court of its power to issue a writ of *certiorari* in appropriate circumstances should be excluded. I do not think that the fact that the Licensing Authority has to record his reasons when he refuses to renew a licence is in the absence of any specification of the grounds on which a renewal may be refused or indeed of any other limitation on his powers in this respect a sufficient indication that he has to act judicially. I am therefore of the opinion that we are bound to hold that the act of the Licensing Authority in refusing to renew the petitioner's licence was an administrative act and that accordingly this Court cannot interfere with such order by a writ in the nature of *certiorari*.

I venture to think, however, that the question whether the Licensing Authority acted quasi judicially or ministerially is one which is somewhat unreal. This Court has power under Article 226 of the Constitution to issue directions and orders as well as writs for any purpose and in exercise of this power it can direct that an administrative order be quashed: see *Prabhabati Devi Sahiba* v. *The District Magistrate, Allahabad* (1) and *Ram Charan Lal* v. *The State of Uttar Pradesh* (2). The question therefore which in my opinion really arises is whether the order complained of in this case is an order made in circumstances which run counter to the elementary principles of justice, for, if that question be answered in the affirmative I am of the opinion that whether the order be quasi judicial or administrative the Court would be justified in directing that it be quashed.

Now there is a line of cases in England which is authority for the general principle that in the absence

(1) I.L.R. [1956] 1 All. 216 (2) I.L.R. [1953] 1 All. 281

of statutory provision to the contrary no man can be deprived of his property without having the opportunity of being heard That this is so is established I think by cases such as *Cooper* v *The Board of Works for Wandsworth District* (1) *Hopkins* v *Smethwick Local Board of Health* (2) and *Smith* v *The Queen* (3) the last being a decision of the Privy Council In *Cooper's* case the Board of Works were empowered by statute to pull down a house if the builder had neglected to give notice of his intention to the Board seven days before beginning to dig or lay the foundations Whether any notice was given in this case was a matter of dispute but *Cooper* admitted that he had commenced digging out the foundations within five days of the day on which he alleged he had sent notice The house had reached the second storey when the Board without notice to *Cooper*, sent their workmen to the site and raised the building to the ground Cooper brought an action for trespass the defence was that the Board had acted within its legal rights under section 76 of the Metropolis Local Management Act 1855 ERLE C J said

> The contention on behalf of the plaintiff has been that although the words of the statute taken in their literal sense without any qualification at all would create a justification for the act which the District Board has done the powers granted by that statute are subject to a qualification which has been repeatedly recognised that no man is to be deprived of his property without having an opportunity of being heard I think the power which is granted by the 76th section is subject to the qualification suggested I think the Board ought to have given notice to the plaintiff and to have allowed him to be heard

(1) (1863) 4 C B N S 150 (2) L R [1880] 24 Q B 713
(3) L R [1878] 3 A C 614

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WILLES J., in the same case had down the law in these terms:

> I apprehend that a tribunal which is by law invested with power to affect the property of one of Her Majesty's subjects is bound to give such subject an opportunity of being heard before it proceeds, and that that rule is of universal application and founded upon the plainest principles of justice.

The principle laid down in *Cooper's* case was approved by the Court of Appeal in *Hopkins v. Smethwick Local Board of Health* (1) also an action for damages for trespass.

That principle had indeed been affirmed a few years earlier in *Smith v. The Queen* (2) decided by the Privy Council in 1878. In that case the appellant had obtained from the Crown a lease of a plot of land measuring some 870 acres in Queensland, Australia, for a term of ten years. The lease was granted under the Crown Lands Alienation Act 1868 sub-section (5) of section 51 of which provided that "the lessee of any agricultural or pastoral land, his agent or bailiff, shall reside on such selection continuously and *bona fide* during the term of his lease provided that if at any time during the currency of the lease, it shall be proved to the satisfaction of the Commissioner that the lessee has abandoned his selection and failed in regard to the performance of the conditions of residence during a period of six months it shall be lawful for the Governor to declare the lease absolutely forfeited and vacated." During the currency of the lease, the acting Commissioner reported that it had been proved to his satisfaction that the appellant had abandoned the plot and had failed in regard to the performance of the conditions of residence during a period of six months and a few days later the Governor issued a proclamation

(1) L. R. [1890] 24 Q. B. 712. (2) L. R. [1878] 3 A. C. 614.

declaring the leave to be absolutely forfeited and vacated. It was contended on behalf of the appellant *inter alia* that there had been no proper hearing before the Commissioner which would enable the Crown to assert that there had been proof to the satisfaction of the Commissioner such as is required by the statute of either abandonment or non-residence. The Crown contented that the Commissioner's decision on questions relating to forfeiture was purely ministerial but their Lordships held that sub-section (5) of section 61 was not so limited in terms nor was it so limited by reasonable intendment. The Judicial Committee were disposed to think that there had not been a finding of the Commissioner of abandonment apart from non-residence. But, their Lordships said, they decide the case upon broader grounds. It appears to them that the defendant had not been heard in the sense in which a hearing has been used in the cases which have been quoted in many others and in the sense required by the elementary principles of natural justice.

I think these cases are, as I have said, authority for the salutary principle that a man must not be deprived of his property without being given the opportunity of being heard. But does a man's property stand in this respect on a special and exclusive footing? I can not see in principle why that should be so. The loss of a man's right to carry on his business may be no less serious in its consequences than the loss of his property and under the Constitution, the right to hold property and the right to carry on a business are equally fundamental rights possessed by every citizen. If there be authority—as I think there is, founded upon the plainest principles of justice—that (in the absence of statutory provisions to the contrary) a man be not deprived of his property without being heard, I can see no reason why that principle should not be applied

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to the protection of another fundamental right, namely the right to carry on business.

Nawkudda Ali v. *Jayawardene* (1) was an authority much relied on by the State. Nawkudda Ali was a dealer in textiles in Ceylon who had been granted a licence to carry on his business under the Defence (Control of Textiles) Regulations, 1945. In 1947 his licence was revoked under Regulation 62 which provided thus: "Where the controller has reasonable grounds to believe that any dealer is unfit to be allowed to continue as a dealer the controller may cancel the textile licence ... on the ground that he had falsified, paying in slips in his dealings with the Textile Coupon Bank." The appellant applied for a writ of *certiorari* alleging *inter alia* that he had not been given a proper opportunity of answering the charge against him. The Privy Council held that the cancellation of the licence was an executive act, the Controller having no duty to act judicially. In truth, their Lordships said, "when he cancels a licence he is not determining a question; he is taking executive action to withdraw a privilege because he believes, and has reasonable grounds to believe, that the holder is unfit to retain it."

I have stated the reasons why, in my opinion, the fact that an order is an administrative one is not necessarily conclusive against the exercise by the Court of its powers under Article 226. It has not been the State's contention that the Licensing Authority was not, in the present case, determining a question; and in my judgment it is clear that, in contrast to Nawkudda Ali, the present petitioner has, by virtue of Article 19(g) of the Constitution, the fundamental right to carry on his trade or business subject to such reasonable restrictions as may be imposed under Article 19(6). He is, there

(1) L. R. [1952] A. C. 65

fore *prima facie* entitled to a licence, and the granting of it cannot therefore, appropriately be described as a privilege. *Nazkudda Ali's* case is not, therefore, in my view of assistance in the determination of the main question which arises in this case.

It is common ground that in this case the petitioner was not afforded an opportunity of being heard. I would, on that ground and for the reasons which I have endeavoured to state, hold that the order of the Licensing Authority, even though it be an administrative order, is one which we would quash in the exercise of our powers under Article 226. I can see no harm which would happen to the Licensing Authorities from hearing the person before they subject him to a disadvantage so grievous as the loss of his right to carry on business; and if I may adopt the words of ERLE C. J., in *Cooper's* case, I can conceive a great many advantages which might arise in the way of public order in the way of doing substantial justice, and in the way of fulfilling the purposes of the statute, by the restriction which we put upon them, that they should hear the party before they inflict upon him such a heavy loss.

In the view I take of the petition, it is unnecessary for me to express an opinion on the other points which were canvassed before us.

The petitioner is, in my opinion, entitled to his costs which I would fix at Rs. 250.

SAPRU, J.:—While agreeing with the order proposed by my brother MOOTHAM, I would like to point out that, having regard to the nature of our Constitution, a licence for the carrying on of a business or profession cannot be looked upon as a mere privilege which is within the unfettered discretion of the Executive Authority empowered to grant it. Particular emphasis has been laid in Article 19(1)(g) on the right to practise

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any profession or to carry on any occupation trade or business subject, of course, as laid down in Article 19(6), to any reasonable restrictions in the interests of the general public as may be placed on it. In guaranteeing this right the founding fathers were no doubt influenced by their concept of the functions of the State. As is clear from the directive principles of State policy to which I think it is permissible to refer in this connexion they were establishing a State guided by certain directive principles which though not justiciable were nevertheless to be *fundamental* in the governance of the country it being its duty to apply them in making laws. For after stating in Article 38 that the State shall try to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice social economic and political shall inform all the institutions of the national life the founding fathers went on in Article 39(*a*) to lay down that the State shall in particular direct its policy towards securing that the citizens men and women equally have the right to an adequate means of livelihood. A refusal to renew a licence on grounds other than those which the licensing authority can legitimately take into consideration can dislocate and paralyse, in the case of a businessman his entire business and deprive him of the means of earning his livelihood. Necessarily, therefore, a misuse of that power can frustrate the very purpose of the welfare State established by the Constitution of this Country. I would like to emphasise that it is necessary to keep this background as the directives represent the political philosophy underlying the constitution in view in considering the questions raised by this application.

Now, what are the main facts of this case. In 1949, the applicant applied for and was granted licence in Form

Bl under the U P Controlled Cotton Cloth and Yarn Dealers' Licensing Order, 1948, to buy and sell controlled cloth This licence was in the in ial instance, to be valid up to 31st October 1950 Thereafter this licence was renewed on two successive occasions for a period of one year each It expired on the 31st October, 1952 Before its expiry on the 9th May 1952, the applicant was served with a notice that the District Magistrate had cancelled his licence for reasons which were not stated by the District Supply Officer in his communication to the petitioner On receiving that notice of cancellation the petitioner came to this Court praying that the aforesaid order cancelling the petitioner's licence be quashed A bench of this Court admitted the aforesaid miscellaneous application and passed an *interim* order staying the operation of the District Magistrate's order cancelling the licence The allegation in the affidavit which has been presented to this Court on behalf of the petitioner is that even after that order the District Magistrate declined to permit he applicant to ply his business under the licence on the ground that the order of this Court was not clear and required clarification It is stated in the affidavit that the view taken by the District Magistrate was that though this Court had directed that the order cancelling the licence should be suspended it was nowhere ordered that the licence should be returned to the applicant On the 22nd June 1952, a bench of this Court directed the District Magistrate to give possession of the licence o the applicant On the 25th September 1952 which was within the time allowed by law, the petitioner presented an application to the District Magistrate for a renewal of his licence The applicant did not get any communication from the District Magistrate in regard to the said application for renewal for a period of over two months On the 1st December

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1952 however he received a notice from the District Supply Officer that the District Magistrate had refused to renew his licence On account of the malpractices indulged in by you and your bad reputation The District Magistrate further directed him to suspend his business activities forthwith and declare his stock of cloth within three days of the receipt of the notice On the 4th December 1952 the applicant informed the District Supply Officer that the applicant had stopped his business activities and supplied him with the details of the amount of stock in his hands On the 12th December 1952 the applicant received a letter from the District Supply Officer directing him to transfer his stock of cloth to a licensed cloth dealer The cloth was as ordered by the District Supply Officer duly transferred Between the 7th December 1952 and 4th January 1953 efforts were made by the applicant to find out from the District Magistrate the reasons for his refusing to renew the licence It is asserted in the affidavit that he met him three or four times in that connection and drew his attention to the fact that the applicant had never indulged in any questionable activities nor had he contravened any of the relevant control orders

Now it is important to note that according to the affidavit filed by the petitioner the District Magistrate refused to set out with any particular preciseness the reasons for his refusing to renew the licence without previously affording him any opportunity to explain the main allegations against him and merely told him that *the applicant was free to take the matter to the High Court even as he had done previously* The District Magistrate with whom he had this talk having been transferred the applicant presented an application on the 15th January 1953 to the District Magistrate

who had succeeded him setting out the facts of his case and praying that the order cancelling his licence be reconsidered The new District Magistrate expressed his inability to alter the order made by his predecessor I am not impressed with the argument that the version given of the talk in paragraph 22 of the petitioner's affidavit is somewhat different being stronger in tone, than the one given in paragraph 14 The conversation whenever it occurred must have been within the knowledge of the then District Magistrate The impression should not have been allowed to be created that the District Magistrate looks upon an approach to this Court as something *reprehensible* or *outrageous* on the part of those affected by his orders In the circumstances of this particular case it was incumbent on the part of the State to remove the impression created by the petitioner's affidavit It cannot be said that the then District Magistrate could not be contacted for this purpose This being the position I am bound to assume that, having regard to the fact that it has not been controverted by any statement in a proper counter affidavit the version given by the petitioner of his talk or talks is substantially correct That being so I am driven to the conclusion that reasons which were not relevant to a consideration of the petitioner's petition for the renewal of the licence were not absent from the minds of the authority refusing the licence On these facts, I am inclined to the view that the refusal to grant the licence was not influenced by considerations which can be solely said to be of a *bona fide* nature In the affidavit filed on behalf of the petitioner it is asserted that on his asking him as to why the licence was not being renewed and he was being discriminated against, he was told that it was because *he had dared to question the order in this Court* It is true that there is only the applicant's

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statement without any indication of the date when the conversation took place in the affidavit to support the statement which has been attributed to the District Magistrate but it is no less equally important to note that in the counter affidavit which has been filed on behalf of the District Magistrate by a Cloth Inspector in the office of the District Supply Officer the statement that the licence had been cancelled as the petitioner had dared to approach the High Court on a previous occasion has not been refuted. It was possible for the State to file a counter affidavit of the then District Magistrate to refute the above allegations which go to suggest that perhaps the District Magistrate was influenced to some extent at all events by considerations not relevant to the consideration of the petitioner's application for the renewal of the licence. This had not been done. It may well be that the fact that he had approached this Court and obtained a stay order when his licence was cancelled was not the only operative reason so far as the decision not to renew his licence is concerned but in the absence of a counter affidavit on behalf of the State I am bound to attach importance notwithstanding the absence of dates and minor discrepancies in the versions given in paragraphs 22 and 14 of the affidavit to the statement made in this behalf by the petitioner in his affidavit. On the basis of the facts set out above I am driven to the conclusion that perhaps the refusal to renew the licence was influenced by the circumstance that the applicant had when his licence was cancelled, dared what was apparently annoying to the Executive authorities to assert his right by coming to this court and seeking its assistance in getting the order of cancellation stayed. Ordinarily this Court does not interfere with administrative orders but, where there are reasons to think that the order has been influenced by extraneous consideration this Court

has in my opinion irrespective of the question whether the order can be classed as falling within the category of *certiorari* or no ample authority under Article 226 of the Constitution to interfere with it by a proper order or direction The words of Article 226 of the Constitution are wide enough to cover an order of that description Reference may be made to the observations of BIND BASNI PRASAD J in *Sm Prabhabati Devi* v *The District Magistrate of Allahabad* (1) While holding in that case that where they were in a state of doubt as to whether the order passed by the District Magistrate was quasi judicial in character or not that a writ of *certiorari* was no permissible they nevertheless thought that Article 226 was now so wide that if any authority had acted against law, then an application under that Article was maintainable against the authority for the issue of proper directions to act according to law Reference may also be made in this connection to two other cases, viz *Dalchand Chittar Mal* v *Commissioner Food and Civil Supplies Lucknow* (2) and *Manohar Ramkrishna* v *G G Desai* (3) The latter was a case in which the petitioner had impugned an order requisitioning a house belonging to him under the C P and Berar Act LXIII of 1948 A preliminary objection was taken to the effect that Article 226 did not permit the Court to assist the petitioner as writ of *certiorari* and *prohibition* could not issue unless the impugned order was a judicial or quasi judicial order and that an order requisitioning property did not fall in either category A further contention was that a writ of *mandamus* could issue only for the purpose of requiring the doing of a positive act and that in that case as no positive act was required from the State, the petitioner was not entitled to the relief or reliefs asked for On the above state of

(1) I L R [1953] 1 All 215 (2) A I R 1952 All 61
(3) A I R 1951 Nag 33

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facts MAGALMURTI and MUDHOLKAR JJ., made the observations quoted below

> It is difficult to appreciate Shri Naik's argument that Directions, orders or writs can issue only in the circumstances in which the writs named specifically can issue because that argument, if accepted, would so restrict the meaning of the words directions, orders or writs as to render them otiose It is commonplace that effect must be given to every provision of a statute no word should be regarded as a surplusage unless that would lead to an absurdity No absurdity results because of the construction we place on this article

After emphasising that the power conferred by Article 226 was discretionary they went on to add that that being so

> It would, therefore not in our opinion be right to read limitations in the wide powers conferred by the general words used therein merely because these words are followed by some specific words which connote a restricted power more so when the article provides that the power conferred by the specific words is included in that conferred by the general words The contention therefore that our powers are limited to the issuing of the specific writs only must fail

I would add that I am in respectful agreement with the above view

Finally I would refer to the case of *Rashid Ahmad* v *Municipal Board of Kairana* (1) In that case the Supreme Court granted relief to the petitioner who had complained that the Municipal Board, Kairana U P had granted a monopoly of wholesale business in vegetables to a third person with the result that the Board had become powerless to grant a licence to the

petitioner there being consequently no by-law under which the Board could grant a licence The petitioner was carrying on wholesale business in vegetables before the acts complained of were done On the above facts the petitioner who had been prohibited from carrying on his business filed a petition under Article 32 before the Supreme Court for the enforcement of his fundamental right of trade under Article 19(1)(g) The Supreme Court allowed the petition and made the following observations

> The powers given to this Court under Article 32 are much wider and are not confined to issuing prerogative writs only

The Supreme Court passed an order directing the Municipal Board not to prohibit the petitioner from carrying on the trade of wholesale dealers etc within the limits of the Municipal Board Kairana

On the facts as gathered from the affidavit the counter affidavit and the affidavit in rejoinder and on the strength of the authorities to which attention has been invited above I have come to the conclusion that this Court should issue (a) an order quashing the order of the District Magistrate Kanpur, declining to renew the licence of the petitioner and (b) a direction to consider the application on the merits

For the reasons given above I concur in the order proposed to be made by my brother MOOTHAM

BY THE COURT—The order of the District Magistrate Kanpur refusing to renew the petitioner's licence for the year 1952 53 is quashed and a writ in the nature of *mandamus* will issue to the District Magistrate, Kanpur directing him to consider the application of the petitioner for the renewal of his licence on its merits The petitioner is entitled to his costs which we fix at Rs 250

Order accordingly

(3) A I R 1950 S C 163

FULL BENCH (APPELLATE CIVIL)

Before the Honourable B. Malik, Chief Justice, Mr. Justice Agarwala and Mr. Justice Bhargava

BHAGWATI DEVI (PLAINTIFF)

v.

SARDAR BALWANT SINGH (DEFENDANT)

1954 September 10

Uttar Pradesh (Temporary) Accommodation Requisition Act, 1947 *of* [illegible]

The words "regulation of house accommodation" in entry no. 2 of List I of the Seventh Schedule of the Government of India Act, 1935 do not include the right to requisition the property under section 3 of the Accommodation Requisition Act, and the Act cannot be impugned on that ground.

Case law discussed.

Execution Second Appeal no. 1485 of 1951 from a decree of K. P. Gupta, II Civil Judge of Meerut dated the 19th March, 1951.

The facts appear in the judgment.

N. S. *Singhal* for the appellant.

S. A. *Dhawan* for the respondent.

The judgment of the Court was delivered by

MALIK, C. J.—This appeal has been filed on behalf of Srimati Bhagwati Devi, plaintiff decree-holder. She was the owner of a shop situate within the cantonment area of Meerut. The defendant, Sardar Balwant Singh, is a refugee from Punjab and the plaintiff's case was that he took wrongful possession of the shop without her consent. On this allegation she filed a suit for his ejectment and it was decreed on the 25th of October, 1948. She put the decree into execution but before the defendant judgment-debtor could be ejected he filed an appeal and got a stay order. In the meantime on the 18th of December, 1948 the District Magistrate requisitioned the shop under section 3 of the U. P. (Temporary) Accommodation Requisition Act (No. XXV of 1947). After the requisition order the District

Magistrate claimed to have taken possession of the shop. He thereafter gave the shop to Sardar Balwant Singh on rent. The order giving the shop to Sardar Balwant Singh is dated the 7th May, 1949, while the original requisition order is dated the 18th of December, 1948. In spite of the requisition order, the decree-holder continued to proceed with the execution application on the ground that the requisition order was invalid and the decree-holder was entitled to execute her decree eject the defendant and take possession of the property. This contention prevailed with the executing court which granted the execution application and directed that the defendant judgment-debtor shall hand over actual possession of the property to the decree-holder. The judgment-debtor appealed and the appeal was allowed by the learned Second Civil Judge of Meerut on the 19th of March, 1951. Against that order this execution second appeal was filed. It came up before a learned single Judge who was of the opinion that two of the points raised merited consideration by a larger Bench and he therefore referred the case for decision by a Full Bench.

The first point which was taken before the learned single Judge and has been argued before us at some length is that in so far as the U. P. (Temporary) Accommodation Requisition Act (hereinafter called the Act) purported to affect property situate within cantonment area it was *ultra vires* the Provincial Legislature. The other point raised is that the Act had ceased to be operative on the 30th of September, 1948 and therefore the requisition order dated the 18th of December, 1948 was illegal. A third point raised that the shop could not be requisitioned as it was in the possession of the judgment-debtor, was overruled by the learned single Judge and, though learned counsel raised that point before us he was not able to explain how the District

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Malik C. J.

Magistrate's power of requisition under section 3 of the Act, if the Act was valid could be affected by the fact that the plaintiff had obtained a decree for ejectment against the person actually in possession of the property.

At the conclusion of his argument, learned counsel wanted to raise a new point that the requisition was not for a public purpose but this point was not raised before the learned single Judge and in the judgment of the lower appellate court it is mentioned that the point was conceded, we cannot therefore allow this point to be raised before us.

The two points, therefore, that call for decision are firstly, whether the Act is *ultra vires*, and secondly, whether it had ceased to be operative on the 30th of September 1948.

Taking up the second point first, section 1 sub-section (3) of the Act provided that—

> It shall cease to have effect on the expiration of one year from October 1, 1947 or if the Provincial Government so directs by notification in the official *Gazette*, on the expiration of two years beginning with that date.

In effect the legislature provided two periods—a period of one year from the 1st of October 1947 or a period of two years from that date if the Provincial Government issued a notification. The Act as its preamble shows, was enacted by reason of shortage of accommodation in the United Provinces which had become very acute due to large influx of refugees as a result of the partition of the country. How long the situation would continue and how long the refugees would continue to pour into India and in U. P. could not be foreseen by the legislature and it was therefore, not in a position to fix the life of the Act definitely to one year. It must have been anticipated that in about a year's time

things would settle down but there being the possibility that the influx would continue for a longer period and a control for a longer period might be necessary, the legislature gave the U P Government the power to issue a notification and it provided that if a notification was issued then the Act would remain in force for a period of two years from 1st October 1947

Learned counsel has urged that this is delegated legislation which is not permitted and therefore after the expiration of one year the Act must be deemed to have become inoperative Reference was made to the decision of a Full Bench in *Ram Kishan v State* (1) which was based on a decision of the Federal Court in *Jatindra Nath Gupta v Province of Bihar* (2) Whatever may have been the position at the time when those cases were decided, the law has since then been clarified by two recent decisions of the Supreme Court *In re* Article 143 Constitution of India and Delhi Laws Act (1922), etc (3) the learned Judges went in detail into the question of the extent to which delegation of legislative function was permissible and that case has now been explained by a recent decision of the Supreme Court in *Rajnarain Singh v Chairman Patna Administration Committee, Patna* (4) At page 578 the various positions that arose in the Delhi Laws Case and the decision thereon were summarised The first two propositions mentioned by their Lordships are—

> (1) Where the executive authority was permitted, at its discretion, to apply without modification (save incidental changes such as name and place) the whole of any Central Act already in existence in any part of India under the legislative sway of the Centre to the new area

(1) I L R [1952] 1 All 376 (2) I L R [1949] Pat 392 (F C)
(3) A I R 1951 S C 332 (4) A I R 1954 S C 569

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(2) Where the executive authority was allowed to select and apply a Provincial Act in similar circumstances

It was held by the majority that it was permissible for the legislature to authorise the executive authority to apply the Act to any new area within its jurisdiction. In the case before us the legislature has permitted the executive authority to apply the Act to the whole of Uttar Pradesh for one more year. A legislature may pass an Act for a definite period or an indefinite period. Here the legislature passed the Act for two definite periods either one year or two years dependent on the circumstances prevailing at the end of the year. The Provincial Government was left merely to decide the question whether the situation had so altered that the Act was no longer necessary in which case they would not issue the notification. We do not think that this can be classed either as delegated legislation or as delegation which was not permissible. This point therefore must be decided against the appellant.

The other point raised by learned counsel arises in this way. In the Seventh Schedule List I entry no. 2 of the Government of India Act 1935 the Federal Legislature had been given the power to legislate with reference to the regulation of house accommodation in such areas (cantonment areas). Learned counsel has urged that the Act regulates house accommodation in cantonment areas and, therefore it should have been passed by the Federal Legislature and not by the Provincial Legislature. He has relied on section 100 of the Government of India Act which rules out the jurisdiction of the Provincial Legislature with reference to any of the matters enumerated in List I in the Seventh Schedule. The question therefore for decision is whether the words 'the regulation of house

accommodation within the cantonment areas include requisition of houses within the cantonment areas In other words whether the word regulation is wide enough to include requisition in this context Before we deal with this point, we may point out that there is a decision of BHAGWATI J of the Bombay High Court in *Tan Bug Tam v Collector of Bombay* (1) where the learned Judge observed that requisition was a distinct and separate category of legislative powers and requisition of property was not covered by or included in any entry in the three Lists contained in the Seventh Schedule of the Government of India Act 1935, and that the Central Legislature was not competent and had no authority to legislate in respect thereof Whether it was by reason of this decision or for any other reason the Governor General acting under section 104 of the Government of India Act issued a notification dated 21st of October 1947 which was published in the *Gazette of India Extraordinary*, dated the 25th of October 1947 and that notification reads as follows

> In exercise of the powers conferred by section 104 of the Government of India Act 1935 as adapted by the India (Provisional Constitution) Order 1947 the Governor General hereby empowers all Provincial Legislatures to enact laws with respect to the requisitioning of land being a matter not enumerated in any of the Lists in the Seventh Schedule to the said Act

learned counsel has urged that this notification is of no avail as the Governor General could only issue a notification empowering the Federal or Provincial Legislature to enact laws with respect to any of the matters not enumerated in any of the Lists in the Seventh Schedule and the Federal Legislature had the power

(1) I L R [1946] Bom 517

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under entry no. 2 of List I of the Seventh Schedule to enact laws for the requisition of houses in cantonment areas. We have therefore to consider whether in view of the entry no. 2 List I of the Seventh Schedule of the Government of India Act 1935 the Federal Legislature had the power to legislate for requisitioning of houses in cantonment areas and in that case in spite of the notification the State Legislature would have no such power with respect to the cantonment areas.

Learned counsel has relied on a decision of a Bench of this court in *Muammat Ahmadi Begum* v. *District Magistrate of Agra* (1). In that case the District Magistrate of Agra had requisitioned a house under section 3 of the U. P. (Temporary) Accommodation Requisition Act 1947 the house being situate within the limits of the Agra cantonment. Reliance was placed on entry no. 2 of List I of the Seventh Schedule of the Government of India Act 1935. It was held by the learned Judges that the Provincial Legislature had no jurisdiction to make any enactment with regard to that matter meaning matter covered by entry no. 2 of List I of the Seventh Schedule of the Government of India Act 1935. On behalf of the District Magistrate no argument was advanced that regulation of house accommodation did not include the power to requisition under section 3 of the Act. The point was more or less conceded at the Bar and it was therefore not considered by the Bench.

The other case *Raman Das* v. *The State of U. P.* (2), to which reference has been made in the referring order as also by learned counsel, does not seem to be of much assistance. In that case a house was built in the

(1) A. I. R. 1953 All. 850. (2) I. L. R. [1953] 1 All. 970.

Mathura city with respect to which the Rent Control Officer had passed an order under section 7 of the U. P. (Temporary) Control of Rent and Eviction Act (No. III of 1947). The argument advanced by learned counsel was that the Act had been passed before the notification of the Governor General mentioned above was issued and the power of allotment given under section 7 to the Rent Control Officer amounted in effect to requisitioning of property. It was held that the power to make an allotment under section 7 of the U. P. (Temporary) Control of Rent and Eviction Act was neither acquisitioning nor requisitioning of property and the Act came under entry no. 21 of List II of the Seventh Schedule of Government of India Act 1935. This case was followed by a Bench of this Court in *Prem Shankar Pandaya v. U. P. Provincial Co-operative Bank Ltd.* (1) in which the learned Judges said:

> Controlling the letting of buildings does not mean a restriction on the right of the owner about not letting the building but such a compulsion to let a building cannot amount to requisitioning the building. The Government does not get possession of the building and then deal with it in any manner it likes.

Learned counsel has referred us to the meaning of the word "regulate" in Shorter Oxford Dictionary at page 1692 but the meaning given in the dictionary does not support the contention of the learned counsel that regulation of accommodation means requisitioning of property. The dictionary meaning of the word is as follows:

> regulate—Control, govern or direct by rules or regulations, subject to guidance or restrictions to

(1) 1952 A. L. J. 520

adapt to circumstances or surroundings, to bring or reduce a person or body of persons to order

In two recent decisions of the Supreme Court—*State of West Bengal* v *Sudhodh Gopal* (1) and *Dwarkadas Shrinivas* v *The Sholapur Spinning and Weaving Co Ltd* (2) the meaning of the words acquisition and requisition and how far acquisition may at times, include requisition for the purposes of Article 31 of the Constitution have been discussed at some length Those cases, however, are not of much assistance to the appellant as their Lordships were not called upon to consider the meaning of the word regulation in entry no 2 of List I of the Seventh Schedule of the Government of India Act nor have they held that it is wide enough to include requisition and acquisition of property

So far as the property outside the cantonment limits are concerned, we have got the U P (Temporary) Control of Rent and Eviction Act (No III of 1947) which gives the District Magistrate the right to control the manner in which houses shall be let out by the landlord to the tenants The District Magistrate under that Act has no power to acquire the property or to requisition the property he can only direct to whom the property is to be let out and on what terms For the cantonment area an Act containing similar provisions is the U P Cantonments (Control of Rent and Eviction) Act (No X of 1952), which was passed by the Central Legislature It gives the officer commanding the station the same powers with respect to accommodation in the cantonment area which the District Magistrate has under the U P Rent Control and Eviction Act with reference to house accommodation outside the cantonment limits

(1) A I R 1954 S C 98 (2) A I R 1954 S C 119

An examination of the various entries in the Lists in the Constitution makes it clear that regulation of house accommodation was not intended and could not include requisition or acquisition of property In List I of the Seventh Schedule the power to enact laws for the purpose of regulation is mentioned in the following entries

Entry no 3—for regulation of house accommodation

Entry no 43—for regulation and winding up of trading corporations

Entry no 44—regulation and winding up of corporation whether trading or not

Entry no 53—regulation and development of oil fields and mineral oil resources

Entry no 54—regulation of mines and mineral development

Entry no 55—regulation of labour and safety in mines and oils fields

Entry no 56—regulation and development of inter State rivers and river valleys,

Entry no 33—mentions acquisition or requisitioning of property for purposes of the Union

Similar result would follow on an examination of List II of the Seventh Schedule The power of acquisition or requisitioning of property in this List is given in entry no 36 Entry no 18 of List II deals with land, that is to say rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents, transfer and alienation of agricultural land land improvement and agricultural loans colonization Entry no 23 deals with regulation of mines and mineral development entry no 32 with regulation and winding up of corporations other than those specified in List I and universities etc

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When a property is requisitioned by the Government all that the person in possession of the house is deprived of is the actual physical possession thereof and not the legal right which had entitled him to remain in possession so that when the requisition order is withdrawn, it is only necessary to restore possession to the person from whom it was taken but in the case of acquisition a right is acquired by the State and if the right, title or interest acquired is no longer needed it has to be legally transferred to whomsoever it is decided to give the right title or interest Regulation only means that the rights of the owner or the person entitled to possession are restricted and controlled by the requisite authority the State Government neither acquiring possession nor the right to possession

It is, therefore that while in the case of acquisition or requisition the State has to pay compensation for what the State has acquired in the case of 'regulation' of house accommodation no compensation is payable obviously because no rights in the property are acquired or get vested in the State If this fundamental difference is borne in mind, and if the word regulation' is interpreted to mean as probably it was intended to mean that the District Magistrate will only control restrict and direct how accommodation shall be let out on what terms and to whom then it is not possible to include in the word regulation the right to requisition or the right of acquisition of such accommodation for the purposes of the Government or for any other public purpose In our view therefore, the words "regulation of house accommodation in entry no 2 of List I of the Seventh Schedule of the Government of India Act, 1935, do not include the right to requisition the property under section 3 of the U P (Temporary) Accommodation Requisition Act 1947 and the Act cannot therefore be impugned on that ground

In the end learned counsel for the appellant has pointed out that the suit was brought for ejectment of a trespasser as the judgment debtor had wrongfully taken possession of the shop and we should, therefore, make it clear that the shop in question belongs to the plaintiff that the legal possession in the property was in the plaintiff and that it is from the possession of the plaintiff that the Collector requisitioned it on the 18th of December 1948 As a matter of fact the order under section 3 dated the 18th of December, 1948 specifically mentions that the property was being requisitioned from the plaintiff Bhagwati Devi Under section 8 of the Act the Collector is bound to return the accommodation requisitioned under the Act to the person from whom it was requisitioned The decree holder is therefore entitled to get formal possession of the land as against the judgment debtor but she will not be entitled to get actual physical possession of the shop so long as the order of requisition passed by the District Magistrate remains in force When the District Magistrate releases the property he shall return it to the plaintiff decree holder Bhagwati Devi from whose possession he requisitioned it Sri S S *Dhawan* appearing for the judgment debtor has no objection to this part of the order

The result therefore is that this appeal is allowed in part and the order of the lower court is modified as indicated above The executing court shall now proceed to deliver formal possession of the property in the manner indicated above but the decree holder will not be entitled to get actual physical possession of the premises to eject the judgment debtor so long as the order of requisition is not withdrawn We make no order as to costs of this Court

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Learned counsel for the appellant has asked for leave to appeal under Article 132 read with Article 147 of the Constitution. The leave asked for is granted.

Appeal partly allowed.

FULL BENCH (APPELLATE CIVIL)

Before the Honourable B. Malik, Chief Justice, Mr. Justice Agarwala and Mr. Justice Bhargava.

RAHMAT ALI FATEH ULLAH (PETITIONER)

v.

1954 November 17

CALCUTTA NATIONAL BANK LIMITED (OPPOSITE PARTY)

Indian Companies Act, 1913, s. 171—*Decree obtained by a Company—Appeal—Application for review of appellate judgment—Leave of Company Judge to be obtained if necessary.*

Where a winding up order was made in respect of a company after it had obtained a decree in suit instituted by it and after an appeal preferred by it against an order allowing defendant's objection under section 47 Civil Procedure Code had been decreed an application for review of the aforesaid judgment of the appellate court being not a legal proceeding commenced against the Company within the meaning of section 171 of the Companies Act can be made by the defendant without obtaining leave of the Company Judge.

Case law discussed.

Review application in First Appeal No. 38 of 1952.

The facts appear in the judgment.

Shambhu Prasad, for the petitioner.

S. N. Kakker, for the opposite party.

The judgment of the Court was delivered by—

MALIK, C. J.—On a difference of opinion between brothers DESAI and BRIJ MOHAN LALL the following point of law was referred to a larger bench for decision:

> Where a winding up order was made in respect of a company after it had obtained a decree in a suit instituted by it and after an appeal preferred by it against an order allowing defendant's objec-

tion under section 47, C P C had been decreed, can an application for review of the aforesaid judgment of the appellate court be made by the defendant without obtaining leave of the Company Court under section 171 of the Indian Companies Act (VII of 1913)?

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RAHMAT ALI FATEHULLAH v. CALCUTTA NATIONAL BANK LIMITED

Malik C J

It is not necessary to set out the facts in detail All that we need mention is that the Calcutta National Bank Ltd had brought a suit against Qudratulla and his son Rahmat Ali Fatehulla for recovery of a large sum of money on the allegation that the principal debtor was the father and the son had guaranteed repayment of the debt During the pendency of the suit the bank had applied for and had got certain aeroscraps attached before judgment Rahmat Ali Fatehulla had claimed that those aeroscraps belonged to him exclusively, and that he had been carrying on a separate business The objection to attachment of the property was however dismissed The learned Judge ultimately decreed the suit against the father but on a finding that it had not been proved that the son was a guarantor the suit against Rahmat Ali Fatehullah was dismissed When in execution of the decree the bank proceeded to sell up the aeroscraps which had been attached, Rahmat Ali Fatehullah filed an objection in the execution court claiming the property to be his own He also filed an application in the suit that since the suit had been dismissed against him the attachment before judgment stood discharged as the property had belonged to him Both these applications were disposed of by the same order the decision being in favour of Rahmat Ali Fatehullah The bank filed an appeal which was allowed by a bench of this Court After the appeal was allowed an order was passed by the Calcutta High Court winding up the bank Thereafter an application was fied for review of which notice

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was issued, and, when it came up for hearing a preliminary objection was taken that no review application could be filed without the sanction of the Company Judge under section 171 of the Indian Companies Act.

Section 171 provides that after an order for winding up is passed, no suit or other legal proceeding shall be instituted or continued against the company without the permission of the Company Judge.

The words of the section appear to be simple enough but a great deal of argument has been advanced as regards their exact meaning. One view which has appealed to brother BRIJ MOHAN LALL and for which there is some authority, that is if a suit is filed by a company other later proceedings in that suit are not other proceedings against the company but are defensive actions by the defendant who has been called upon to defend a suit filed by the company itself. If this view is accepted then the word 'suit' would mean 'everything connected with it right up to the last stage'. For example if a suit has been filed by a company even though the later proceedings may have been initiated by the other side they are not other proceedings against the company; in other words if the suit was decreed by the trial court and an appeal was to be filed by the defendant after the winding up order then that appeal would be supposed to be a continuation of the suit itself and not a proceeding against the company but a defensive action in the suit filed on behalf of the company.

The other view taken by brother DESAI and for which also there is some authority is that the crucial date is the date of the winding up order and one has to see who is the party who initiated the proceedings pending on that date. For example if a suit was filed by the company and the suit was decreed after the winding up order then the defendant can file an appeal without

the permission of the Company Judge as on the date of the winding up order there was no proceeding against the company but the proceeding pending was the suit filed by the company itself If on the other hand the suit was decreed before the winding up order and the defendant has to file an appeal or continue an appeal already filed then permission of the Company Judge under section 171 is required

Section 171 does not bar the institution or continuation of a suit or other legal proceeding by the company but against the company Some difficulty has arisen with regard to the meaning of the words or other legal proceeding They have been interpreted in some cases to mean other original proceedings like a suit in the court of first instance

In *Benaras Bank Ltd v Sashibhushan Misra* (1) MANOHAR LALL and MUKHERJI JJ followed the view of TEK CHAND, J in the Full Bench decision of the Lahore High Court in *Srimati Shukantla v People's Bank of Northern India Ltd, in liquidation through Bhagwati Shanker, Official Liquidator* (2), that—

> This expression legal proceeding' in this section (section 171) is coupled with suit and obviously means proceedings *ejusdem generis* that is to say original proceedings in a Court of first instance analogous to a suit initiated by means of a petition similar to a plaint It does not include proceedings taken in the course of the suit nor proceedings arising from the suit and continued in a higher Court like an appeal from an interlocutory or final order passed in the suit

The other view which was taken by BRAUND J in *Rawat Raj Kumar Singh v Benares Bank Ltd Benares* (in liquidation) (3), was that an appeal or a revision can be treated as a legal proceeding The same view was

(1) A I R 1946 Pat 398 (2) I L R [1941] Lah 760
(3) I L R [1943] All 170

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taken by him in *B Maharaj Kishore Khanna* v *Benares Bank, through Official Liquidator* (1) He was of the opinion that even if the proceeding had been started on behalf of the company of the company had gone into liquidation, no appeal could be filed without the sanction under section 171 of the Indian Companies Act

In *Shiromani Sugar Mills Ltd in liquidation, (through J C Mukerji and S S Dhawan Official Liquidators)* v *Governor General in Council (through Fourth Additional Income tax Officer Excess Profits Tax Circle Cawnpore* (2) the learned Judges IQBAL AHMAD C J and BRAUND, J held that—

> the expression suit or other legal proceeding in section 171 Companies Act ought not to be given an artificially narrow construction by confining it to proceedings of the technical nature of a suit "

The proceedings in that case were however not proceedings arising out of a suit, but proceedings under section 46 of the Income Tax Act commenced by the Income tax Department and the question was whether those proceedings were legal proceedings

In *Governor General in Council* v *Shiromani Sugar Mills Limited (in liquidation)* (3), the decision of the Allahabad High Court in *Shiromani Sugar Mills* case was approved and the learned Judges disagreed with the Lahore view that 'other legal proceedings must mean original proceedings in a Court of first instance analogous to a suit initiated by means of a petition similar to a plaint' They observed

> 'Section 171 must in our judgment be construed with reference to other sections of the Act

(1) I L R [1941] All 56 (2) I L R [1946] All 352
(3) A I R 1946 P C 16

and the general scheme of administration of the assets of a company in liquidation laid down by the Act. In particular, we would refer to section 232. Section 232 appears to us to be supplementary to section 171 by providing that any creditor (other than Government) who goes ahead notwithstanding a winding up order or in ignorance of it, with any attachment, distress, execution or sale, without the previous leave of the Court, will find that such steps are void. The reference to distress indicates that leave of the Court is required for more than the initiation of original proceedings in the nature of a suit in an ordinary Court of law. Moreover the scheme of the application of the company's property in the *pari passu* satisfaction of its liabilities, envisaged in section 211 and other sections of the Act, cannot be made to work in co-ordination unless all creditors (except such secured creditors as are outside the winding up in the sense indicated by Lord WRENBURY in his speech in *Food Controller v. Cork* (1)) are subject as to their actions against the property of the company to the control of the Court. Accordingly, in our judgment, no narrow construction should be placed upon the words "or other legal proceeding" in section 171. In our judgment, the words can and should be held to cover distress and execution proceedings in the ordinary courts. In our view such proceedings are "other legal proceedings against the company" as contrasted with ordinary suits against the company."

In view of the observations of SPENS, C. J., in Shiromani Sugar Mills case it is no longer necessary to refer to various decisions in which a contrary view was taken

(1) L. R. [1923] A. C. 647

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Since, however they were cited at the Bar we may briefly refer to them

In *Mulawa Ram v People's Bank of India* (1) it was held that a revision application filed against a company was other legal proceeding and it was not maintainable without the permission of the Company Judge This view was overruled in *Kishan Singh v Industrial Bank of India* (2) where it was held that an appeal or an application for revision against an order passed in a proceeding initiated by the company did not come under section 171 Reliance was placed on a case of the *House of Lords in Humber v Griffiths* (3)

In *Jiwan Das v Peoples Bank of Northern India* (4) it was held by ADDISON and DIN MOHAMMAD JJ that in an action brought by the company an appeal could be filed without the permission of the Company Judge

The same view was taken by TEK CHAND J in *Simla Banking and Industrial Co Ltd Lahore v Indo Swiss Trading Co Ltd Calcutta* (5)

In *Shrimati Shukantla v Peoples Bank of Northern India Ltd* (6) the same view was affirmed on a different interpretation of the words legal proceeding It was held that A suit under Order 21 Rule 63 against a company in liquidation being a suit within the meaning of section 171 Companies Act cannot be commenced without the leave of the court which had ordered the winding up"

In *Benares Bank Ltd v Sashibhushan Misra* (7), MANOHAR LALL J dissented from the view expressed by BRAUND, J in *Rawat Raj Kumar Singh v Benares Bank Ltd , Banares (in liquidation)* (8) and purported to follow the observations of TEK CHAND J in

(1) A I R 1916 Lah 24
(2) A I R 1918 Lah 191
(3) (1901) 85 L T 141
(4) A I R 1937 Lah 926
(5) A I R 1938 Lah 754
(6) I L R [1941] Lah 754
(7) A I R 1948 Pat 388
(8) I L R [1941] All 17

Shrimati Shukantla v Peoples' Bank of Northern India Ltd (1) which view, however, had been overruled by the Federal Court in the year 1946

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After the decision of the Federal Court, it must now be held that the meaning of the words other legal proceedings must not be confined within narrow limits and need not necessarily be proceedings analogous to a suit initiated by means of a petition similar to a plaint

Whenever a matter comes up before a court and an objection is taken that leave under section 171 of the Companies Act had not been obtained the Court has to decide whether it is a suit or other legal proceeding against the company If the words Against the company merely mean that the company is arrayed as the opposite party, as was held by BRAUND, J, permission of the Company Judge would be necessary whenever any legal proceeding has to be instituted or continued against the company That this could not be the meaning is obvious from the fact that where the company has come to Court and has instituted the proceeding which it can do without the leave of the Company Judge the defendant will be required to take his permission to institute or continue any legal proceeding to defend himself To hold that would put the defendant in a difficult position and it would be necessary before he can take any proceeding against the company even by way of defence or to disprove the company's claim or to get some order passed in favour of the company vacated to take the permission of the Company Judge The words against the company must mean a proceeding where a liability is intended to be fastened on the company or its assets and not a proceeding

(1) I L R [1941] All 769

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commenced by a person with the object of escaping liability arising out of a proceeding commenced by the company itself It would probably be useful to clarify the position a little further If a person wants to file a suit to escape liability on the ground that the company s claim against him is unfounded it is a proceeding against the company, but where the company has started the proceeding, that is, put forward its claim in a court of law, any remedy available by way of defence to escape liability, which the company wants to fasten on him should not be deemed to be a proceeding commenced or continued against the company and in such a case the question, whether the claim was put forward or the suit was filed by the company before or after the winding up order, should make no difference

(1), Lord DAVEY said

> It was the respondents who themselves proceeded with the action after the winding up order, by prosecuting their appeal in the Court of Appeal, and when once an action by the company itself has been proceeded with, there is no necessity for the defendants in that action to obtain leave for any defensive proceeding on their part

BRAUND, J, distinguished these observations and confined them to a case where the action had been taken by the company and proceeded with after the winding up order As Lord DAVEY was merely stating the facts of the case before him he should not be understood to have meant that if the appeal had been filed and proceeded with by the company before the winding up order, his decision would have been the other way

This appears to us to be also just and proper as in

(1) (1901) 85 L T 141

such a case it is the company which wants to fasten the liability, while the person against whom such liability is attempted to be fastened, in a legal proceeding pending in a court, wants to escape that liability Liquidation proceedings under the Companies Act are for making available the assets of the company in *pari passu* satisfaction of its liabilities, and if persons other than secured creditors are allowed to enforce their claims without any control exercised by the Company Judge it may defeat or delay that object But where a company has initiated a proceeding in a court of law, whether before or after the winding up order, no permission of the Company Judge should be needed for anything done by the defendant or the opposite party to escape the liability thus intended to be fastened on him If however the proceedings in a court of law are started by a person other than the company either with the object of fastening a liability on the company or with the intention of escaping a liability in respect of a claim which has not been brought into Court by the company itself, the permission of the Company Judge is required for the institution or the continuance of the proceedings For instance, if a person files a suit for a declaration that the company owes to him a certain sum of money, or that he does not owe the company any sum of money, the permission of the company Judge is necessary If however, the company has instituted a suit or other proceeding to enforce a claim, any action taken by the defendant or the opposite party by way of defence or if the company has obtained a decree or order, any defensive action by way of appeal, revision, review or setting aside of an *ex parte* decree or order should not require the permission of the Company Judge If the proceedings have been instituted or continued on behalf of the Company after

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the winding up order according to the view taken by BRAUND, J the subsequent proceedings by way of defence would come under the rule laid down by Lord DAVEY There does not appear to us with great respect to the learned Judge to be any good reason for coming to the conclusion that the result should be otherwise where the proceedings had been instituted and continued by the company before the winding up order specially as under section 171 of the Companies Act the company is not required to obtain the permission of the Company Judge for the institution or the continuance of a legal proceeding

In our view, therefore in a case like the present where the company has obtained a decree an application to have that decree reviewed by reason of some error apparent on the face of the record is not a legal proceeding commenced against the company within the meaning of section 171 of the Indian Companies Act and no leave of the Company Judge was necessary

Order accordingly.

APPELLATE CIVIL

Before Mr Justice Dayal and Mr Justice Mukerji

ASHA DEVI (PLAINTIFF)

1953
March 11

v

CHAMPA DEVI AND OTHERS (DEFENDANTS)

Indian Contract Act, 1872, *s 74—Default clause in a family arrangement—Whether a penalty —Liquidated damage, and penalty distinction between*

In a suit for possession of certain zamindari and house properties the question was whether the following clause in a family arrangement arrived at between the parties can be said to be in the nature of a penalty within the meaning of s 74 of the Contract Act?

If the amount of three harvests becomes due by the first party and the second party does not receive it on my account she shall have the right to cancel this deed of compromise and obtain possession over that property which she has left in possession of the first party at present and which is mentioned at the foot of this deed of compromise

The name of the first party shall be struck off and that of the second party entered in public papers The first party shall have no objection to it The second party shall have the right to realise the remaining amount of the fixed instalment with interest aforesaid from the property of the first party who shall not be liable for the amount in future

Held, there was no penalty imposed which subsisted along with the contract but the contract itself was to be abrogated according to the clause on the happening of a contingency And no party was being subjected to any particular hardship because of the default but on the other hand parties were being relegated to the position in which they were originally at the time of entering into contract

Held, further that the Kernel of distinction between liquidated damages and a penalty is that the essence of a penalty is a payment of money stipulated *in terrorem* of offending party while the essence of liquidated damages is a genuine covenanted pre estimate of the damage

Case law discussed

1950

ASHA DEVI v. CHANDRA DEVI

First Appeal No 341 of 1939, from a decree of Brij Mohan Lal, Civil Judge of Saharanpur (as he then was) dated the 15th February, 1939

The facts appear in the judgment

Shambhu Prasad, for the appellant

G S Pathak, K C Mital, C S Saran, S N Katju, B R Avasthi and *J N Takru*, for the respondents

The judgment of the Court was delivered by—

MUKERJI, J —This is an appeal by a plaintiff in a suit for possession of certain zamindari and house properties which were detailed *in extenso* at the foot of the plaint The suit which has given rise to this appeal arose under the following circumstances

Rikhi Lal and Raghubans Sahai were two brothers who owned considerable house and zamindari property in the district of Saharanpur, they also owned certain mortgagee rights under two usufructuary mortgage deeds of the value of Rs 42,000 Raghubans Sahai was the first to die he died some time prior to 1905, leaving behind his son Shambhu Nath as his heir Rikhi Lal the other brother, died in 1905 leaving a widow Srimati Asha Devi, who is the plaintiff in this appeal Rikhi Lal, before his death had executed a will in favour of the plaintiff and it was on the basis of this will that she succeeded in getting mutation effected in her name on a moiety share of the family property

Disputes however, arose between Srimati Asha Devi on the one hand and—Shambhu Nath Raghubans Sahai's son on the other These disputes however were amicably settled by means of a family arrangement The settlement which was arrived at was recorded in a document which was registered and which in effect forms the basis of the present suit This document,

which we shall refer to hereafter as the family arrangement, was executed by Shambhu Nath and Asha Devi on the 17th of August, 1908. By means of this family arrangement it was settled that Shambhu Nath was to be the owner in possession of the entire properties including the mortgagee rights in respect of the two usufructuary mortgage deeds except a certain house no. 7 and certain other houses mentioned in List A of the list appended to the family arrangement. Asha Devi was also to receive from Shambhu Nath a sum of Rs. 16,000 in cash at the time of the registration of the family arrangement, and she was to receive annually a sum of Rs. 1,300 as maintenance. this sum of Rs. 1,300 was payable by Shambhu Nath in two half yearly instalments falling due on the 15th of February and the 15th of August every year. The family arrangement also made provision that in the event of three consecutive defaults in respect of the maintenance payable half yearly, the family arrangement was to terminate or in the words of the arrangement, Asha Devi was given—

> The right to cancel this deed of compromise and obtain possession over that property which she has left in possession of the first party at present and which is mentioned at the foot of this deed of compromise.
>
> (These are the words in which the family arrangement has been translated and these words appear at page 85, line 35 of the paper book).

According to the family arrangement, if Asha Devi did not obtain possession over certain property on account of its being redeemed she was to receive a sum of Rs. 5,000 in cash with interest at the rate of eight annas per cent. per mensem from the date of cancellation after allowing a set off to the extent of Rs. 16,000 which was to be paid to her under the

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family arrangement at the time of registration The document also created a charge in respect of this sum of Rs 5,000 on certain items of property enumerated in List A of the family arrangement Asha Devi was also given the right to recover the arrears of maintenance in the even of this falling into arrears These were the material conditions provided for by the family arrangement

Shambhu Nath made payments of the maintenance payable to Asha Devi according to the family arrangement up to the 15th of February, 1933 and thereafter there was default There were successive defaults on the 15th of August, 1933, 15th February, 1934, and 15th of August 1935 Asha Devi consequently taking advantage of the provision in the family arrangement, terminated the arrangement and laid claim to the properties which she had, under the family arrangement, given to Shambhu Nath In paragraph 7 of her plaint she stated as follows

> Out of Rs 1,300 payable annually, the plaintiff has received the entire amount due up to the 15th of February, 1933 After this, she did not receive the amount which was payable on the 15th of August, 1933 15th of February 1934, and the 15th of August 1934 The last instalment fell due on the 15th of August, 1934 and as the amount was not received, the right to cancel the document, dated the 17th of August, 1908, and to demand possession over the property accrued to the plaintiff She accordingly enforced that right, cancelled the said document and demanded possession but no compliance was made '

Compliance not having been made she filed a suit to get back the property on the 11th of November, 1935, out of which the present appeal has arisen

Certain events happened during the period since the 17th of August, 1908, the date on which the family arrangement had been recorded, and the date on which the right to cancel that arrangement, namely, the 15th of August 1934, accrued to the plaintiffs and it is necessary to indicate very briefly some of those events During this period Shambhu Nath and his successors made certain transfers in respect of properties which had been received by Shambhu Nath under the family arrangement The other event of importance to notice is the fact that Shambhu Nath died some time in 1934 One other matter need be noticed at this stage and that matter is that some time in 1926 Shambhu Nath mortgaged certain properties to Ram Sarup and others and left the responsibility of making payments of the annuity receivable by Asha Devi on the mortgagees Asha Devi however was not party to this contract

The suit was filed against the heir of Shambhu Nath and the transferees from Shambhu Nath this had to be so because as we have indicated earlier, the suit was a suit for possession and after the transfers some of the properties had passed into the hands of the transferees and possession had to be obtained in respect of those properties from the transferees

There were two sets of defendants therefore the first set consisting of the heir of Shambhu Nath and the second set the transferees The defence taken by the heir of Shambhu Nath, namely, Srimati Champa Devi his widow, was that Rikhi Lal and Shambhu Nath were members of a joint Hindu family and that on the death of Rikhi Lal, the property passed to Shambhu Nath by survivorship and, as such, the family arrangement relied upon by the plaintiff was an illegal transaction The existence of the family arrangement was also denied, it was also said that if

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there was a family arrangement in existence then it had been obtained by fraud and was therefore not binding. It was further contended that the term under which the plaintiff claimed to have cancelled the arrangement was penal in its character and was consequently unenforceable at law. There was a further defence which need be noticed and that was that the suit was barred by the provisions of the Encumbered Estates Act and section 11 of the Code of Civil Procedure. This defence was raised because of the fact that Sumiti Champa Devi, widow of Shambhu Nath, had filed an application under section 4 of the Encumbered Estates Act on the 23rd of September 1951. In this application, Champa Devi had shown the properties to which claim was being laid by Asha Devi as her own properties. It may be noticed also that Asha Devi laid a claim to the arrears of maintenance before the Special Judge at a certain stage of the proceedings there.

The defence of the transferees followed more or less the same line which was taken by Champa Devi the widow of Shambhu Nath. The transferees, however, raised two more pleas in defence. That they that is defendants 2 to 4 were not liable to pay the sum of Rs 5,000 to the plaintiff, inasmuch as the usufructuary mortgage in respect of which this claim of Rs 5,000 was made had been redeemed. All the transferees claimed protection under section 41 of the Transfer of Property Act, and they also raised the bar of limitation.

The trial court recorded the following findings on the evidence which was adduced before it:

(1) That, for the purposes of the case it was immaterial whether Shambhu Nath was or was not a member of a joint Hindu family at the time of Rikhi Lal's death.

(2) That there was default in the payment of three successive instalments

(3) That none of the transferees made any reasonable or independent inquiry so as to protect them under section 41 of the Transfer of Property Act The learned trial Judge further found that in this case the plaintiff did nothing which could have misled the transferees into believing that their transferor had the right to make the transfer The learned Judge was also of the opinion that section 41 of the Transfer of Property Act was inapplicable, in terms, to the facts and circumstances of the present case, inasmuch as, the transferor in this case was not the ostensible owner of the property but was, at the time when he made the transfer the real owner under the family arrangement

(4) That there was no fraud or misrepresentation of any kind in regard to the family settlement and consequently the settlement was binding on the parties

The trial Judge, even though he came to the aforementioned findings in the suit, dismissed the suit on two grounds First on the ground that the clause in the family settlement by the enforcement of which the suit for possession was filed was in the nature of a penalty and consequently could not be enforced Secondly the trial Judge was of the view that the plaintiff came in for possession in regard to that property which Champa Devi had shown as her own in the list of properties appended by her to her application before the Special Judge under section 4 of the Encumbered Estates Act, and so in respect of those properties the plaintiff's suit was barred

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Before this case came up for final disposal before us two other matters were decided by this Court and we should like to refer to those two matters at this stage. One such question was whether a civil court had jurisdiction to determine a question of title to property which had been shown in a list published under the provisions of section 11 of the Encumbered Estates Act and about which the plaintiff either failed to prefer a claim before the Special Judge before filing a suit in the civil court, or preferred the claim after the institution of a suit in the civil court for recovery of possession of such property on the basis of title. The aforementioned question was referred by the Bench before which this appeal came up for hearing on the 21st of September 1949 to a Full Bench for opinion. On the 16th of September 1952 the Full Bench decided the question thus:

> The Civil Court has jurisdiction to determine the question of the plaintiff's title in the present case and we answer the last part of the question referred to this Bench accordingly.

As a result of the Full Bench decision therefore the plaintiff's suit for recovery of possession could not be held to be barred under the provisions of section 11 of the Encumbered Estates Act.

The other matter which has been decided at an earlier stage is whether the entire appeal abated as a result of the death of Kushumbari Dass respondent no. 5 whose heirs were not brought on the record within the time allowed by law. In regard to this matter the point that had been decided was that the death of respondent no. 5 Kushumbari Dass leads to the abatement in respect of the claim as against that respondent alone, but does not mean the abatement of the entire appeal.

This decision apparently was based on the principle that the claim as against the deceased respondent was separable from the claim in regard to the other respondents and that there would be no real inconsistency in the decrees that may be made by this Court as against the living respondents with the decree that determined the rights as against the deceased respondent.

On behalf of the appellants the main question that claimed the attention of the learned counsel in arguments was the question whether or not the suit could be decided on the ground that the plaintiff's right to claim possession hinged on a clause in the family arrangement which was in the nature of a penalty. As we have noticed earlier the trial Judge was of the opinion that relief could only be granted to the plaintiff by enforcing the clause of the family arrangement which was in the nature of a penalty. Reliance was placed by the trial Judge on the provisions of section 74 of the Indian Contract Act. Section 74 of the Indian Contract Act is in these words:

> When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

The first explanation to the section may also be quoted:

> "*Explanation*—A stipulation for increased interest from the date of default may be stipulation by way of penalty.

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It is not necessary to quote either the exception or the other explanation which is incorporated in the section. It will be observed that in section 74, two types of stipulations are contemplated. First, a stipulation to pay a sum of money and the second a stipulation of any other kind that may be in the nature of a penalty. Where parties to a contract mutually agree that in the event of a breach, the one shall pay to the other a specified sum of money, it not infrequently becomes a question of some difficulty whether such It is not necessary to quote either the exception or the sum is to be considered in the nature of a penalty — that is as a sum to be paid in the event of any damage however great or small, which may be incurred by a breach of the contract, or as liquidated damages—that is, as the sum to be paid in that event without reference to extent of the injury actually sustained and the question is to whether a sum stipulated for in a contract is a penalty or a liquidated damage is for the Court to decide. The fact that the sum is expressly stated in the contract to be a penalty or liquidated damages as the case may be is *prima facie* evidence that it partakes of that character but is not conclusive. A distinction has been drawn between liquidated damages and a penalty and the kernel of that distinction is to be found in the fact that the essence of a penalty is a payment of money stipulated *in terrorem* of the offending party, while the essence of liquidated damages is a genuine covenanted pre estimate of the damage. Whether a stated sum or a sum that may be definitely ascertainable on the terms of the contract is or is not a penalty can be determined by a court with comparative ease inasmuch as there are a good many authorities of high value from which principles for such determination can be easily gleaned but the position in regard to the other stipulations by way of penalty cannot so easily be determined because there are not

many decided cases interpreting the scope and the nature of these words.

The clause which is said to be in the nature of a penalty in the family arrangement is in these words—

> If the amount of three harvests becomes due by the first party and the second party does not receive it on any account, she shall have the right to cancel this deed of compromise and obtain possession over that property which she has left in possession of the first party at present and which is mentioned at the foot of this deed of compromise. The name of the first party shall be struck off and that of the second party entered in public papers. The first party shall have no objection to it. The second party shall have the right to realize the remaining amount of the fixed instalment with interest aforesaid from the property of the first party who shall not be liable for the amount in future.

The trial Judge took the view that the right conferred on the plaintiff to recover the arrears of instalments along with interest at six per cent. per annum, and also the right given to her to obtain possession over that share of the property which she had handed over to Shambhu Nath at the time of the family arrangement in the event of the default of three consecutive instalments of the maintenance money, was in the nature of a penalty; because this was—

> a sort of punishment imposed on Shambhu Nath and his successors in interest for non-payment of three consecutive instalments on due dates.

In our opinion, the learned Judge was not right in the view that he took of this clause. In order to make a clause penal, the clause and the contract must in our judgment subsist and that the effect of the 'penal'

clause should continue to be effective along with the subsistence of the contract. A clause in a contract which terminates the contract and places the parties in the same position in which they were before the contract was entered into, could not be said to be a penal clause. There was in this case no penalty being imposed which subsisted along with the contract but the contract itself was to be abrogated according to the clause on the happening of a contingency. No party was being subjected to any particular hardship because of the default, the parties were being relegated to the position in which they were when they originally entered into the contract. In order to correctly judge the import of a clause of a family arrangement one has to look at the family arrangement as a whole, and one has also to look at the intention of the parties which is to be gathered from the circumstances in which the agreement was made. In this case we find that there was a dispute in relation to the share of Rikhi Lal which was held by his widow Asha Devi, the plaintiff. Shambhu Nath was claiming it on the strength of the right of survivorship while Asha Devi claimed it on the ground that her husband at the time of his death was a separated member of a Hindu family. This dispute was mutually settled by the family arrangement. Asha Devi giving up her right to possess the properties on condition that she was paid a certain specified sum at the time of the execution of the document and a certain specified sum periodically by way of maintenance. Under these circumstances it was natural for Asha Devi to make certain that she did get her maintenance regularly and that in the event of her maintenance falling into arrears the bargain could be annulled and she could get possession over the property which she had handed over in consideration of receiving regular maintenance. There was, in our judgment,

nothing in this anxiety of Asha Devi to safeguard the regular payment of her maintenance which could be termed *in terrorem* It was a part of the bargain itself the very basis of the bargain and not a term which rendered the bargain any the more difficult of performance on the happening of a certain contingency or something which had the effect of terrorising the other party to the bargain to adhere to the bargain In our judgment, it was a fair stipulation which placed the parties on an equal footing for if Shambhu Nath found it more profitable to keep the properties in his possession then he had to pay the annual maintenance within the specified time, but if he found it difficult to make the payments within the specified time then he could give up the property and save himself the annual payments

Reliance was placed by the learned Judge on the decision of *Munshi Lal* v *Ahmad Mirza* (1), for the view that clause 4 of the family arrangement was in the nature of a penalty within the meaning of section 74 of the Indian Contract Act *Munshi Lal's* case lays down that where a contract carries with it an element of punishment, it is in the nature of a penalty The material condition which fell for interpretation in *Munshi Lal's* case was in these terms

> That if, for any reason, the whole or part of the property sold goes out of the possession of the vendees and their heirs and representatives their the vendees then heirs and representatives shall have *also* power that by cancellation of the sale deed executed this day by the vendees in favour of the executant no 4, they get possession of the said property returned and become in possession of the property entered in the said sale deed as a proprietor like the vendee "

(1) (1933) I L R 8 Luck 707

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In the view of the learned Judges of the Oudh Chief Court, the use of the word also in the aforementioned paragraph indicated that the condition was by way of an additional remedy and therefore, was in the nature of a penal clause. This condition was interpreted as a condition of defeasance and after referring to the provisions of section 31 of the Transfer of Property Act, it was noticed that a condition subsequent by way of defeasance on the happening of an uncertain event can be valid, they went on to say that, even if the law allows such a condition being imposed, a Court was not bound in law to enforce such a condition in any particular case. Reliance was placed on the case of *Alexander Popham* v. *Bampfeild* (1) and particularly on the observations of the Lord Chancellor in that case at page 326. The learned Judges of the Oudh Chief Court were of the opinion, relying on the words of the Lord Chancellor, that in the circumstances of that case it was just and equitable to relieve the defendants of the specific enforcement of the condition. They were of the view that the additional remedy of forfeiture given to the plaintiffs in that case was in the nature of a liability imposed on the defendants as a punishment for their committing a breach of the agreement. In the present case we are of the opinion that the right given to the plaintiff to cancel the contract as a whole was not in the nature of a punishment but was in the nature of a safeguard of the plaintiff's own interests in the property which she had chosen to pass to Shambhu Nath on his discharging certain obligations which he was required to discharge as a consideration for the transfer. We are aware that a penalty may be a vindictive penalty or a reasonable penalty, and that it may be severe or mild, fair or unfair, but in all circumstances a penalty

(1) ( ) 1 Ch. D. 326.

remains a penalty, but to constitute the existence of a penalty what is necessary is that it should appear that there was an element of punishment however well deserved and temperate such punishment may be, about it In this case we have taken the view that there was no element of punishment

Reliance was next placed by the learned trial Judge on the decision of the Privy Council in *Steedman v Drinkle* (1) In that case there was an agreement for sale of certain land, and on execution of the agreement a portion of the purchase money was paid and for the balance it was provided that it should be paid with interest by annual instalments on a particular date in each year and that on any default the whole property and interest secured by the agreement should at once become due and be payable or the contract should be forfeited and determined at the option of the vendor, and it was also provided that time was to be considered as the essence of the agreement The first instalment was not paid the vendor thereupon gave notice cancelling the agreement The vendee after receipt of the notice tendered the amount but the vendor declined to receive it The vendee sued for specific performance and, in the alternative, claimed a relief against the forfeiture clause in the agreement On these facts it was held by their Lordships of the Judicial Committee that there was no justification for decreeing specific performance and that the stipulation for forfeiture was one for a penalty which the vendee should be relieved against Their Lordships further pointed out that under the agreement of that particular case the court below was right in holding that the appellant could not insist on forfeiture in accordance with the strict terms of the agreement It is important to notice that the vendee's

(1) (1916) 33 T C 322

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claim for specific performance was rejected with the result that the parties were, by the decision of the court, restored back practically to the position in which they were before the covenant for sale was executed. It had been held by the Judicial Committee earlier in the case of *Kilner v. British Columbia Orchard Lands Limited* (1) that stipulation that payments already made of instalments might, on forfeiture be returned, was really a stipulation for penalty and should be relieved against. There can be no doubt therefore, that where a party under a contract obtains an unfair advantage on the happening of a breach, then courts lean against the party trying to secure such an unfair advantage. In the case before us the plaintiff does not, in our judgment, obtain any unfair advantage by the enforcement of the clause which gives her the right to determine the family arrangement in its entirety.

Reliance was next placed on a decision of the Nagpur Judicial Commissioner's Court in *Bana Bai v. Chandrabhaga* (2). In that case the first defendant to the suit executed a deed of maintenance in favour of the plaintiff agreeing to pay her a certain sum of money every year for her maintenance, and if default was made to deliver to the plaintiff possession of a certain field for cultivation and appropriation of profits in lieu of maintenance. Defendant 4 to the suit was a purchaser of the property without notice of the plaintiff's right and he after his purchase, made certain improvements on the property. Default was made and the plaintiff sued for possession on the strength of the agreement. It was held, first that the document did not transfer any right to the plaintiff in the property, and that the agreement was only an executory agreement which could be enforced if the plaintiff wished to exercise the option

(1) L.R. [1918] A.C. 819. (2) (1930) 128 I.C. 400.

given to her The fourth defendant was willing to pay the maintenance and hence the agreement was not specifically enforced It was further held that the provision for the surrender of the possession of the field under the circumstances was in the nature of a penalty within the meaning of section 74 of the Contract Act and the Court, as such, was not bound to enforce it The learned Judges of the Nagpur Judicial Commissioner's Court pointed out that the object with which that particular stipulation was put into the agreement was to induce the executants to pay up the amount as soon as the demand for possession was made, and naturally, therefore, they were driven to the conclusion that the condition was in the nature of a penalty It was argued before the learned trial Judge that even if the clause in question was in the nature of a penalty even then it could not be relieved against inasmuch as it was contained in a family settlement The learned Judge rightly overruled this contention, because he had the authority of this Court in *Mohuddin v Kashmiro Bibi* (1) to the effect that a compromise, even if embodied in a decree, would not necessarily be enforced by a Court if it contained a penal clause

On behalf of the appellant reliance was placed on the decision of *Sheo Prasad v Sanaullah* (2) where it was held that the term penalty cannot be properly applied where all that is agreed between the parties is that they shall revert to the situation existing immediately prior to the new agreement, even though that may involve liability on the part of one of them for a sum greater than if he had carried out the agreement In that case one of the parties in effect said this

> If you will agree to pay me so much I will accept it if you do not so pay, I must stand upon my legal rights

(1) (1933) I L R 55 All 834 (2) 1930 A L J 894

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and in regard to this it was held that such a partition could not be regarded as a penalty because it was no exacting of anything more than was due.

Reliance was next placed on the decision in *Rajagopalachariar v. Varadarajachariar* (1). In that case on a partition among three Hindu brothers, it was agreed that one of them should instead of being given any land, be entitled to receive from each of the others an annuity and on default of payment of such annuity should be entitled to resume the portion of his share which had gone to the defaulter. It was held that this clause could not be described as a penalty or could it be regarded as a forfeiture clause. It was pointed out that in order to find a penalty clause it is necessary to first discover whether there were in effect two contracts in one, namely one a primary contract, and the other in the nature of a subsidiary contract and when on the failure of the primary contract the subsidiary contract becomes enforceable then in such cases courts are called upon to determine whether or not the subsidiary contract is a contract in the nature of enforcing a penalty. In the case before us there was really no subsidiary contract enforcing a penalty.

On behalf of Champa Devi respondent it was also urged that specific performance should not be granted in this case in view of the provisions of section 24(c) of the Specific Relief Act. Section 24 enjoins:

> Specific performance of a contract cannot be enforced in favour of a person
>
> (c) who has already chosen his remedy and obtained satisfaction for the alleged breach of contract,

(1) A.I.R. 1925 Mad. 94

Reliance was based on this provision on the ground that Asha Devi had already approached the Special Judge for the purpose of getting the overdue instalments. We do not consider that the fact that Asha Devi had approached the Special Judge with respect to the arrears of her maintenance was the choice of an alternative remedy made by her, or that the choice of that remedy could have obtained for her satisfaction for the alleged breach of contract. The remedy to receive the overdue instalments was not an alternative remedy to getting back the property on failure of three consecutive instalments.

On behalf of the respondents it was further argued that the present suit was barred by the provisions of Order II, rule 2 C. P. C. because according to the respondent the relief for possession should have been sought before the Special Judge by the plaintiff when she approached that court with regard to the arrears of maintenance, because the cause of action in respect of both the reliefs was the same. No such bar was raised in the written statement and indeed there could be no such bar to this suit, inasmuch as the present suit had been filed before the plaintiff approached the Special Judge under the provisions of the Encumbered Estates Act.

On behalf of the transferees the main argument was that the suit was barred by the provisions of section 41 of the Transfer of Property Act. The trial Judge had considered this argument and had come to the conclusion that there was no such bar. It was found that none of the transferees made any inquiries in regard to the title of his transferor. The learned Judge further found that the section should not in terms apply because Shambhu Nath was not an ostensible owner but was in effect the true owner when he made

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the transfers, although his ownership was liable to be defeated on the happening of a certain contingency. The learned Judge further found that the plaintiff did not act either of commission or omission which could have misled the transferees in any manner. We have examined the evidence and we are satisfied that the learned Judge was right in the conclusions at which he arrived in regard to this matter. Therefore in our judgment, the transferees could not, under the circumstances of this case, invoke the aid of section 41 of the Transfer of Property Act for their protection.

On behalf of the transferees, it was lastly contended that this suit was really a suit for specific performance of a contract and that specific performance should not be decreed inasmuch as the decree cannot now be enforced by giving possession to the plaintiff in respect of the zamindari properties, those properties having vested in the State by virtue of the Zamindari Abolition Act. We however, are of the opinion that the present suit was not a suit really for the specific performance of a contract but it was a suit for possession, pure and simple. In relief A of her plaint the plaintiff's prayer was set out as follows:

> (A) The plaintiff may be put in possession over the property specified below on the dispossession of the defendants.'

The suit embraced not only zamindari properties but also house properties. On the view that we have taken the plaintiff was entitled to possession of the properties in suit. Whether she can get actual possession or not by virtue of some statutory provision is not in our judgment a ground for not giving her a decree for possession. The question whether she can or cannot be put in actual possession in respect of cer-

tain properties will undoubtedly be determined when that question comes before the Court in execution proceedings

In the result, we allow this appeal set aside the decree of the trial court and decree the plaintiff's suit the decree, however, will not be as against respondent no 5 namely, Kushumbari Dass in respect of whom there has been an abatement of the appeal by virtue of a previous order of this Court The appellant will be entitled to get the costs of this litigation from the respondents

Appeal allowed

CIVIL MISCELLANEOUS

Before Mr Justice Sapru and Mr Justice Chaturvedi

1953
April 9

SHEOKUMAR PANDEY AND ANOTHER (APPLICANTS)

v

V G OAK AND OTHERS (OPPOSITE PARTIES)

Representation of People Act, 1951, *ss 81 and 82—Candidate withdrawing his candidature without contesting election—If, a necessary party to an election petition—Meaning of candidate' in s 81 explained—Constitution of India Art 226—Error of law by an election tribunal—Writ jurisdiction—High Court, if can exercise*

A candidate who withdraws his candidature on the date of scrutiny and does not contest the election cease to be a duly nominated candidate at the election and is not a necessary party to an election petition

Under section 81 of the Representation of People Act a candidate must be a person if the polling takes place who continues as a candidate right up to the time that the election is held

An error of law in the decision of a preliminary issue which an election tribunal is competent to determine is no ground for quashing the order of the tribunal in the exercise of writ jurisdiction by High Court

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Parry & Co. Ltd. v. Commercial Employees' Association Madras (1) relied upon and *R. v. Northumberland Compensation Appeal Tribunal* (2) referred to.

Civil Miscellaneous (Writ) No. 96 of 1953.

The facts appear in the judgment.

Gopalji Mehrotra and *Kamta Nath Seth*, for the applicant.

The Standing Counsel (*Jagdish Swarup*), for the opposite parties.

The judgment of the Court was delivered by—

SAPRU, J.:—This is an application under Article 226 of the Constitution of India praying that this Court may be pleased to issue a writ of *certiorari* quashing the order passed on the 13th November, 1952, by opposite parties nos. 1 to 3, and a writ of prohibition directing opposite parties nos. 1 to 3 not to proceed with the election petition no. 316 of 1952, *Sahib Ram Jaiswal v. Sheo Kumar*.

The facts which have given rise to this petition may be stated briefly.

The first general elections under the Constitution of India were held in the district of Allahabad in January, 1952. The Sirathu Manjhanpur constituency, from which the applicants were seeking election in this district, was a double member constituency, with a seat reserved for a Scheduled Caste candidate. For the election there were as many as nine candidates, viz., opposite parties nos. 4 to 15. Sri Sheo Kumar Pandey and Sri Sukhi Ram Bharatiya were among the duly nominated candidates for the Uttar Pradesh Legislative Assembly. Both of them were standing on the Congress tickets. Sri Sahib Ram Jaiswal and Srimati Sushila Devi were set up as candidates on behalf of Kisan Mazdur Praja Party.

Election at the aforesaid constituency was held on the 28th January, 1952, and after the counting of votes the

(1) A.I.R. 1952 S.C. 179. (2) [1952] 1 All E.R. 122.

petitioners no. 1 and 2 were declared elected on the 9th February, 1952. Thereafter Salig Ram Jaiswal opposite party no. 4 presented an election petition challenging the election of the petitioners before the Election Commissioner of India New Delhi. That election petition was sent for disposal to the Allahabad Election Tribunal consisting of opposite parties nos. 1 to 3 with opposite party no. 1 as Chairman. One Ganga Prasad has filed his nomination which was scrutinised and accepted by the Returning Officer. He, however, withdrew his candidature subsequently and did not contest the election. The petition filed by the opposite party no. 4 was objected to by the petitioners on the ground *inter alia* that inasmuch as the petitioners had failed to implead this Ganga Prasad as a party the petition was liable to be dismissed. This question was decided by the Tribunal by its judgment dated the 13th November, 1952. The Election Tribunal having held that it was unnecessary for the opposite party no. 4 to implead Ganga Prasad the petitioners have now come up to this Court under Article 226 of the Constitution.

Before considering the various points which have been raised in the case reference may be made to the fact that it is conceded by both the parties that the Election Tribunal which is functioning in Allahabad is subject to the jurisdiction of this Court under Article 226 of the Constitution. Article 324 of the Constitution vests *inter alia*, the powers of appointing election tribunals for the decision of doubts and disputes arising out of or in connexion with, election to Parliament and to the Legislatures of States in the Election Commission. Article 329 lays down that an election to the Union or State Legislature can be questioned only by an election petition presented to such authority and in such manner as may be provided for by or under

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any law made by the appropriate legislature. The Act has laid down the constitution of the Election Tribunals to which petitions may be referred for disposal by the Election Commission to try the petitions. No provision in the Constitution takes away the power of superintendence which this Court exercises under Article 227 or the power of issuing writs to an election tribunal once it has been constituted to hear a petition. It is unnecessary to dilate on this point further as it is the common case of both the parties that this Court has jurisdiction to entertain a writ petition against an Election Tribunal.

The case of the petitioners is that even though Ganga Prasad withdrew his candidature on the date of scrutiny, he remained a duly nominated candidate and that it was not competent to the Election Tribunal to hear the election petition without Ganga Prasad having been impleaded. The short question, therefore, in this petition is whether the failure of opposite party no. 1 to implead Ganga Prasad is fatal to the maintainability of the election petition presented by opposite party no. 4.

On the date of the nomination as many as nine candidates were nominated. Among them was one Ganga Prasad. He survived his scrutiny under section 36 of the Representation of People Act, 1951 (hereinafter called the Act) but withdrew his candidature under section 37 of the Act on the date fixed under clause (c) of section 30. The question that has to be considered is whether under these circumstances he can be said to have remained a duly nominated candidate on the date of polling.

As much controversy has centred round section 82 of the Act, we consider it necessary to reproduce it. It runs as follows:

> Parties to the petition—A petitioner shall join as respondents to his petition all the candidates who

were duly nominated at the election other than himself if he was so nominated

It is contended that section 82 must be read in the context of section 79. Both sections 79 and 82 occur in Part VI. The heading of this part is "Disputes Regarding Elections" and Chapter I has the heading "Interpretation". It is urged that the words "at the election" in section 82 really are synonymous with "for the election" and that they are wide enough to include a candidate who was a duly nominated candidate on the date of the nomination but who ceased to be a candidate on the date when the polling actually took place. Section 79 is in the nature of a definition clause and defines a "candidate" as meaning "a person who has been or claims to have been duly nominated as a candidate at any election" and any such person shall be deemed to have been a candidate as from the time when, with the election in prospect, he begin to hold himself out as a prospective candidate. Clearly a wide definition had to be given to the word "candidate" as the object appears to have been to prevent corrupt or improper practices. The words "at any election" in section 79 would in cases in which an actual election takes place have reference to the exact time when the polling takes place. It is vital to note that the definitions given in section 79 are subject to the context otherwise requiring. On this part of the case we may invite particular attention to section 52 in Chapter III of Part V which brings out the difference contemplated by the legislature between the position of a candidate who withdraws his candidature on the date of scrutiny and a candidate who dies before the actual polling takes place. If a duly nominated candidate dies after the date fixed for the scrutiny of nominations and a report of his death is received by the Returning Officer before the commencement of the poll the Returning Officer is under an obligation

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upon being satisfied of the fact of the death of the candidate to countermand the poll and report the fact to the Election Committee. In such a case all proceedings with reference to the election have to be commenced afresh in all respects as if for a new election. Even a candidate who has withdrawn his candidature can have himself renominated under those circumstances as a candidate for the election.

A perusal of section 52 of the Act will show that the consequences which ensue when a duly nominated candidate dies before the election takes place are very different from those which follows the withdrawal of a duly nominated candidate from the election. In the former case proceedings have to begin afresh while in the latter case the candidate simply goes out of the electoral picture and the election takes place from among the other duly nominated candidates as if he had never sought election.

It has been pointed out that Part V of the Act deals with the conduct of elections. Chapter I lays down the rules and procedure for the nomination of candidates. Under section 30 the Election Commission has to appoint the last date for making nominations, the date for the scrutiny of nominations, the last date for the withdrawal of candidature and the date or dates on which a poll shall, if necessary, be taken. Each of these four acts has to be done after giving a notice of the intended election in such form and manner as may be prescribed, inviting nominations of candidates for the election and specifying the place at which the nominations are to be filed. Now under section 32 it is open to any person to have himself nominated as a candidate for election to fill a seat in any constituency if he is qualified to be chosen to fill that seat under the provisions of the Constitution of this Act. Clause (1) of section 33 lays down the manner in which each candidate shall, either in

person or by his proposer or seconder between the hours fixed in that section, deliver to the Returning Officer at the place specified in that behalf in the notice issued under section 31 a nomination paper completed in the prescribed form and subscribed by the candidate himself as assenting to the nomination and by two persons referred to in sub section (2) as proposer and seconder. Section 33(2) enables any person whose name is registered in the electoral roll of the constituency and who is not subject to any disqualification mentioned in section 16 of the Act to subscribe as proposer or seconder as many nomination papers as there are vacancies to be filled but no more subject to the proviso contained therein. Clause (3) of section 33 requires that the nomination paper delivered under sub section (1) must be accompanied by a declaration in writing subscribed by the candidate that the candidate has appointed as his election agent for the election either himself or another person who is not disqualified under the Act for the appointment and who shall be named in the declaration and by such other declarations if any, as may be prescribed. It is to be noted that under this clause no candidate shall be deemed to be duly nominated unless such declaration is or all such declarations are delivered along with the nomination paper. Sub-clause (5) makes it incumbent on the Returning Officer to satisfy himself that the names and electoral roll numbers of the candidate and his proposer and seconder as entered in the nomination paper are subject to the correction of any clerical error the same as those entered in the electoral rolls. Clause (6) of this section enables the Returning Officer to require the person presenting the nomination paper to produce if his name is not registered in the electoral roll of the constituency for which he is the Returning Officer either a copy of the electoral roll in which the name of the candidate is included or a certified copy of the relevant entries in

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such roll. Section 34 lays down that a candidate, in order to be deemed to be duly nominated, must deposit, or cause to be deposited, a certain sum in the Reserve Bank of India or in a Government Treasury. It will be seen that the fulfilment of these conditions is necessary for being a duly nominated candidate. Section 35 deals with notice of nominations and the time and place for their scrutiny. Section 36 deals with the important question of scrutiny and nomination papers and casts upon the Returning Officer a duty to refuse any nomination on any of the grounds mentioned in section 36 (2) clauses (a) to (e). Section 36 enables a candidate to withdraw his candidature either himself by a certain date fixed under clause (c) of section 30 by a notice in writing in person or by his proposer, seconder or election agent authorized to withdraw the candidature. It is vital to note that under sub-section (2) no person who withdraws his candidature is allowed to cancel the notice of his withdrawal. It is equally vital to note that under sub-section (3) the Returning Officer on receiving a notice of such a withdrawal has to cause a notice of the withdrawal to be affixed in some conspicuous place in his office. Under section 38 the Returning Officer, after the scrutiny and withdrawal have taken place has to prepare and publish a list of valid nominations in such manner as may be prescribed. It is clear from the scheme outlined above that it is only from among the list of duly nominated candidates who have not withdrawn their candidature and taken back their deposit that the list of valid nominations can be drawn up. It will also be seen that for the purpose of the election the candidate who allows himself to be nominated with due formalities, who survives the scrutiny of his nomination paper but withdraws his nomination before or on the date fixed for the withdrawal of the deposit ceases to be any kind of candidate at the election

Now it must be noticed that what section 82 does is to lay down that a petitioner shall join as respondents to his petition all the candidates who were duly nominated at the election other than himself if he is so nominated. The right of presenting petitions on one or more of the grounds specified in sub-sections (1) and (2) of section 100 and section 101 to the Election Commission has been given under section 81 to any candidate at such election or any elector in such form and within such time, but not earlier than the date of publication of the name or names of the returned candidate or candidates at such election under section 67 as may be prescribed.

Mr. *Gopalji Mehrotra's* contention is that the candidates referred to in section 82 are the candidates who were duly nominated, regardless of the fact whether they withdrew their candidature or not. He contends that notwithstanding the fact that the candidate has withdrawn his candidature and his name does not appear in the list of valid nominations he still remains a duly nominated candidate and therefore, must be impleaded as a necessary party. Mr. *Gopalji Mehrotra* has strenuously argued that there is a distinction between a candidate who is duly nominated and a candidate who is validly nominated. According to him a candidate becomes a validly nominated candidate after his name appears in the list of nominations published by the Returning Officer. But so far as the duly nominated candidate is concerned, he is merely a person whose nomination has been accepted as laid down in the manner enumerated above by the law. The argument is that the withdrawal of a duly nominated candidate has no effect so far as the obligation of the petitioner to make him a party to the petition is concerned. Now it strikes us that this argument ignores the fact that the expression used by the legislature is not "all the candidates who were duly nominated" but "all the candidates who were duly nominated *at the*

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election. Great significance has to be attached to the words "at the election". If the object of the legislature was that all candidates, whose nominations had been accepted by the Returning Officer regardless of the fact whether they withdrew their nominations and contested the election or not, should be made parties to an election petition, it is hard for us to understand why the expression "candidates" who are duly nominated" is qualified by the words "at the election". It strikes us that the distinction between a "candidate for election" and "Candidate at an election" is one which cannot be ignored. It is well known that long before the election takes place a candidate nurses his constituency. A person may be nominated, proposed and seconded, may deposit the necessary security and yet on the date of scrutiny, after calculating his chances, may come to the conclusion that the best thing for him to do is to withdraw himself from the contest and not allow the electorate any opportunity of recording votes for or against him. During the period that he was holding himself out as a candidate, he was a candidate for election. But after he withdrew from the contest, minutes his withdrawal and gets back the security, he cannot be said to be a candidate *at the election*. The words "at the election" have reference to the actual time when the voting takes place. Assuming election to be a continuous process with nomination as a preliminary requisite for standing as a candidate, the words "at the election" would seem, *in the context in which they are used* in section 82, to refer to the period when the actual polling takes place. Incidentally, we may note that the word "election" is defined in Murray's Dictionary in the following manner:

> The formal choosing of a person for an office, dignity or position of any kind, usually by the votes of a constituent body. The choice by popular vote of members of a representative body

(in the United kingdom chiefly of members of the House of Commons) the whole proceedings accompanying such a choice

We may also quote the definition of the word election given in the Shorter Oxford English Dictionary Second Edition which is as follows

> The choice by popular vote of members of a representative assembly, e g the House of Commons The exercise of deliberate choice

We may on this part of the case refer to an unreported decision of CHAGLA C J and DIXIT, J of the Bombay High Court in *Sitaram Hirachand Bali* v *Yeshwantsingh Shankarsing* (Special Civil Application no 2017 of 1952 decided on 19th December 1952) with which we are in agreement

Now, it has been argued that the word candidate has been defined in section 79 (*b*) that the definition is wide enough to include a duly nominated candidate who withdraws his candidature and that that is the interpretation we should give to that word under section 82 Now it strikes us that it is not until the Returning Officer publishes the list of valid nominations under section 38 that everybody knows which among the duly nominated candidates are the candidates at the election Section 79 gives a definition of the words candidate and returned candidate But there is no definition of the words duly nominated in section 79 That has to be gathered from the other sections to which reference has been made by us On a survey of the relevant provisions the inference appears to us to be irresistible that the words at the election have been used in section 82 in its popular sense

We cannot understand how and why a person who completely wipes himself off so far as the election is

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concerned, by withdrawing himself from the contest should be regarded as vitally interested in the election in the same manner as other duly nominated candidates who contest the election. His position cannot be higher than that of any voter at an election. Indeed, it is possible to imagine that in the party or groups he belongs to, some persons may have, because of their standing with their group or party, a more living interest in the election than the withdrawn candidate. Now it is open to a voter to present an election petition but the law does not make it obligatory on him to implead all the voters to an election petition. We are totally unable to understand why an exception should be made in the case of a withdrawn candidate.

Learned counsel for the opposite parties has drawn our attention to several sections in which the distinction between 'at the election' and 'for the election' has not been borne in mind and the words have been used interchangeably. We are free to say that the Act does not appear to have been artistically drawn up. We however think that the proper course for us is to give to the words 'at the election' a natural meaning. It was sought to be argued that a candidate who allowed himself to be duly nominated and thereafter withdrew his candidature should be placed on a higher footing than an average voter inasmuch as a petition can be filed by him even if he is not a voter in the constituency. We are unable to discover any provision in the Act which would enable a withdrawn candidate who is not a voter to present such an election petition. Reliance is placed for the above proposition upon section 81. But here it is obvious that the words "any candidate are qualified by 'at such election'." They cannot obviously include a person who withdrew himself from the contest before the election was over. Nomination may be an essential prerequisite to election and

may be process in election but it does not constitute the whole process of election. Our interpretation of section 81 is that the candidate must be a person if the polling takes place who continues as a candidate right up to the time that the election is held.

References were made to the decisions of certain election tribunals. We allowed them to be cited before us but we do not think it necessary to consider them at length. We are unable to agree with the view expressed by one of those election tribunals that a duly nominated candidate who has withdrawn himself from the contest has an interest in the election as his withdrawal may have been due to the fact that he wanted by such withdrawal to help the candidature of some other candidate of his by way of persuasion. The fact is that the withdrawn candidate is no candidate at all. He has simply gone out of the picture. We therefore think that the Tribunal has taken a correct view of the meaning of section 82. In our opinion Ganga Prasad was not a necessary party.

The question as to what the proper meaning of the words "duly nominated candidate at the election" in section 82 is a question of law on which the election Tribunal's view should be regarded as final. It is well known that *certiorari* and prohibition are not granted to rectify pure errors of law. We may refer on this part of the case to the recent case of *Parry & Co. Ltd.* v. *Commercial Employees Association Madras* (1) where the Supreme Court has held that the High Court cannot issue a writ of *certiorari* to quash a decision passed with jurisdiction by a Labour Commissioner under the Madras Shops and Establishments Act 1947 on the mere ground that such decision is erroneous in law. The appellant before the Supreme Court was a limited liability company carrying on business in Madras.

(1) A.I.R. 1952 S.C. 179

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The respondent was the Association of Clerical Employees including those under the appellant. A petition was presented by the respondents before the Labour Commissioner Madras under section 51 of the Shops and Establishments Act, for a determination of certain questions relating to the rights and privileges of the employees of the appellant. Notice was issued by the Commissioner calling upon the appellant to appear and answer the contention raised on behalf of the employees. After hearing the parties and considering the evidence which had been adduced before him, the Labour Commissioner made his decision on six separate issues two of which are relevant for the purposes of this case. Pointed attention may be drawn to them. They were as follows:

> *Issue no.* 5—Whether there has been an increase in working hours from 6 to 6½ on week days from 12th October 1948 and the increase is permissible?
>
> *Issue no.* 6—Whether overtime wages at twice the ordinary rates should not be paid for work done by the employees after the normal working hours?"

The view of the Labour Commissioner was that the business hours of the Company were six and half prior to 1st April, 1948 when the Act came into force and they continued to be so even after the Act. As regards issue no. 6, the finding of the Labour Commissioner was that the employees in the company would be entitled to overtime wages only when the statutory hours were exceeded. The finding of the Labour Commissioner was challenged in a writ petition before the High Court. The learned Judges of the High Court allowed the petition in part and quashed the order of the Labour Commissioner in so far as it decided that

the employees would be entitled to overtime wages only when the statutory hours were exceeded This view of the Madras High Court did not find favour with the Supreme Court On the above facts their Lordships of the Supreme Court came to the conclusion that there was no error apparent on the face of the proceedings or any irregularity in the procedure by the Labour Commissioner going contrary to principles of natural justice For those reasons they held that there was no ground which could justify a superior court in issuing a writ of *certiorari* for the removal of an order or proceeding of an inferior tribunal vested with powers to exercise judicial or quasi judicial functions We find it hard to distinguish that case from the present one

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Reference may also be made to the earlier case of *Ebrahim Aboobakar* v *Custodian General of Evacuee Property, New Delhi* (1) In that case it was pointed out by MAHAJAN, J, who delivered the judgment of the Supreme Court that the legislature had not limited the jurisdiction of the Custodian General by providing that such exercise would depend on the existence of any particular state of facts as he had been constituted an appellate court under section 24 of the Administration of Evacuee Property Act in words of the widest amplitude The law as laid down by the Supreme Court in the case is that, ordinarily a court of appeal has an inherent jurisdiction to determine any points raised before it in the nature of preliminary issues by the parties Such a jurisdiction is inherent in its very constitution as a court of appeal Whether an appeal is competent, whether a party has *locus standi* to prefer it whether the appeal in substance is from one or another order, and whether it has been preferred in proper form and within the time prescribed are all matters for the decision of the appellate court so constituted The

(1) A I R 1952 S C 319

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question whether Ganga Prasad continued to be after his withdrawal a duly nominated candidate and for that reason a necessary party to the election petition was thus in the nature of a preliminary issue which it was competent for the election tribunal to determine. The fact that the tribunal was a tribunal of restricted jurisdiction in the sense that it had been constituted only to try election cases referred to it makes no difference so far as the generality of the law relating to the powers of this Court to interfere in *certiorari* is concerned.

Reference was made by learned counsel for the applicants to certain observations of the Court of Appeal in the case of *R. v. Northumberland Compensation Appeal Tribunal* (1) where it was held that *certiorari* could be used to quash the decision of a statutory tribunal not only where the tribunal had exceeded its jurisdiction but also where an error of law appeared on the face of the record. Apart from the fact that there is no error of law apparent on the face of the record and the law has in our opinion been correctly interpreted by the election tribunal it is unnecessary to consider the full implications of this case as this Court is bound by the decisions of the Supreme Court. We have indicated clearly that an error of law in the decision of the preliminary issue which an election tribunal was competent to determine is according to the law laid down by the Supreme Court no ground for quashing the order of the tribunal in the exercise of our powers of issuing a writ of *certiorari*.

It was strenuously contended by Mr. *Gopalji Mehrotra* that the question of impleading Ganga Prasad was in the nature of a collateral fact upon the existence of which the jurisdiction of the court to hear the election

(1) [1952] 1 All. E. R. 12.

petition depended. We are satisfied that there is no substance in this argument. The question whether Ganga Prasad should be impleaded or not was not in the nature of a collateral fact upon the existence of which the jurisdiction of the court to hear the election petition depended but was a preliminary issue which the court was competent to determine and that being so even on the assumption that the tribunal has taken a wrong view—and we have indicated that it has not—the view of the tribunal must be held to be final. For this reason alone apart from the other reasons to which we have invited attention this application must fail.

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We accordingly dismiss this application with costs which we assess at Rs 300.

Application dismissed

APPELLATE CIVIL

Before the Honourable B. Malik, Chief Justice and Mr. Justice Bhargava

1953 *July 24*

DEVI CHAND (DEFENDANT)

,

HAR KISHAN DAS (PLAINTIFF)

Indian Evidence Act, 1872, *s. 65—Draft of a document—Whether secondary evidence—Transfer of Property Act 1882, s. 108—Mortgagor's right to grant a lease—Simple mortgage effect of—Certain clause in a mortgage deed—rights of lessor and lessee.*

A draft of a document cannot be treated as secondary evidence.

Gopal Das v. Sri Thakurji, (1) distinguished.

A mortgagor's right to grant a lease of his property does not come to an end by executing a simple mortgage and as

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between the lessor and the lessee the lessee is not entitled to rely on the clause in mortgage deed that the mortgagor shall take the consent of the mortgagee in granting lease and urge on that ground alone that the lessor had no power to grant the lease and it was void

Iron Trades Employers Insurance Association v Union of House and Land Investors Ltd (1) and *Raja Kamalshya Narayan Singh v Chohan Ram* (2) distinguished

First Appeal no 566 of 1944 from decree of Brij Narain second Civil Judge of Saharanpur dated the 7th August 1944

The facts appear in the judgment

B Dayal, H P Gupta and *Satish Chandra*, for the appellant

Jagdish Swarup for the respondent

The judgment of the Court was delivered by—

MALIK, C J Har Kishan Das is the owner of a flour mill known as Hari Kishan Dass Steam Roller Flour Mills situate in Saharanpur On the 19th of October 1936 Har Kishan Das leased out the mills to the defendant appellant Seth Devi Chand for a period of ten years at a rent reserved at rupees twenty five thousands per year on certain conditions embodied in that document On the 8th of December 1937 the defendant served a notice (Ex 2) on the plaintiff informing him that he had stopped running the flour mill with effect from 26th November 1937 and had no mind to run the factory any further After that date there was further exchange of notice and ultimately on the 15th of February 1938 the plaintiff took back possession of the mills and on 27th November 1943, filed a suit out of which this appeal has arisen claiming rupees seventy thousands as damages for breach of contract The defendant raised various pleas in defence and as a result of those pleas the lower court framed thirteen

(1) [1937] 1 All E R 461 (2) 1952 A L J 710

issues and decreed the plaintiff's suit for recovery of Rs 52,862 11 10 and dismissed the rest of the claim The defendant filed this appeal and the plaintiff filed a cross objection against the portion of the claim that was dismissed by the lower court

We have heard learned counsel for the parties at some length On behalf of the defendant it is urged that the defendant was not liable for any damages as he was perfectly within his rights in giving notice of the 8th of December, 1937 and repudiating the contract, and secondly that the damages claimed from him were excessive

Before we deal with these points in detail, it may be convenient to give the facts so far as they have been proved by the evidence on the record

On the 10th of January 1935 the plaintiff Har Kishan Das had executed a simple mortgage in favour of Bhagwan Das Bank Ltd for a sum of Rs 1 50,000 Copy of that mortgage deed is Ex A 5 The only relevent portion of this mortgage deed to which reference has been made by the learned counsel for the appellant is a covenant which provides that the mortgagors 'shall not let or lease out the mortgaged property for any period exceeding one year without the permission of the Bank in writing On the 19th of October 1936, as has already been mentioned, the plaintiff executed a lease in favour of the defendant for a period of ten years The relevant portion of the deed is as follows

> Now for a period of ten years, commencing from the 25th of October, 1936, and lasting up to the 24th of October, 1946, I the first party have in lieu of a fixed *thika* money of Rs 25,000 a year leased out to Seth Devi Chand second party the

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entire *karkhana* with machineries engine boiler and other accessories appertaining thereto

The plaintiff in his cross examination admitted that he had not obtained any written permission from the Bank for obtaining this *thekanama* from the defendant The defendant got into possession of the mill and started working it They however made some default in payment of the *theka* money and on the 22nd July, 1937 the plaintiff filed a suit (Suit no 18 of 1937) for recovery of Rs 5 181 2 8, the arrears of *theka* money claimed to be due On the 18th of October 1937 the defendant filed a written statement paragraph 2 of which was as follows

> The plaintiff has deceived the contesting defendant It was not disclosed to the contesting defendant that the site of the Mill stands mortgaged to Bhagwan Das Bank Under the terms of the mortgage deed, the plaintiff has got no right to let out the Mill on lease, for a term exceeding one year without the consent of the mortgagee and hence the said lease is invalid null and void and is not binding on the contesting defendant"

So far as this record goes this is the first document in which any reference is made on behalf of the defendant objecting to the non disclosure of the term in the mortgage deed that the mortgagor will not execute a lease for more than one year without the mortgagee's consent Two papers were filed in the lower court on behalf of the defendant, Ex A 11, and Ex A 12 Ex A 11 was said to bear some date in August, 1937 but the paper itself bears no date Ex A 12 is another paper without date and sent either towards the end of August or the beginning of September, 1937 These two documents purport to be copies of notices sent by the defendant to the plaintiff These were filed as

copies of notices sent to the plaintiff of which the originals being in plaintiff's possession, the defendant was entitled to give secondary evidence thereof The plaintiff denied the admissibility and endorsed on these papers not admitted These two documents were admitted into evidence on the statement made by the defendant Devi Chand who however, said that these were drafts and did not say that they were copies His statement in examination chief is as follows

> I sent a reply to the plaintiff's notice and its draft has been filed by me It is dated nil and it reached the plaintiff on 21st August 1937 It is the correct copy of the original reply marked Ex A 11 I sent a reply to the plaintiff's notice, dated 26th August, 1937 and its draft is also filed Identifies the draft to be correct marked Ex A 12

The original notice if any being in plaintiff's possession and he not having produced them the defendant had no doubt a right to give secondary evidence But the secondary evidence could only be such as was admissible in law Section 63 of the Indian Evidence Act (No 1 of 1872) defines secondary evidence as follows

> Secondary evidence means and includes
>
> (1) certified copies given under the provisions hereinafter contained,
>
> (2) copies made from the original by mechanical processes which in themselves insure the accuracy of the copy and copies compared with such copies
>
> (3) copies made from or compared with the original
>
> (4) counterparts of documents as against the parties who did not execute them

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(5) oral accounts of the contents of a document given by some person who has himself seen it

A copy of a document may therefore, be admissible as secondary evidence but a draft cannot be treated as secondary evidence These two papers Exhibits A 11 and A 12 do not come under any of the five categories of secondary evidence mentioned in section 63 They are not copies made from or compared with the original According to the defendant himself they are merely drafts

Learned counsel has however relied on a decision of their Lordships of the Judicial Committee in *Gopal Das* v *Sri Thakurji* (1) The question there was of the admissibility of a certified copy of a receipt alleged to have been executed by Parshotam Das on the 29th March, 1881 The High Court had rejected the copy on the ground that the defendant had not laid any foundation for the admission of secondary evidence, and there was no evidence to prove the execution of the receipt by Parshotam Das Reliance is placed on the observations of SIR GEORGE RANKIN where he said

> Where the objection to be taken is not that the document is in itself inadmissible but that the mode of proof put forward is irregular or insufficient it is essential that the objection should be taken at the trial before the document is marked as an exhibit and admitted to the record A party cannot lie by until the case comes before a court of appeal and then complain for the first time of the mode of proof A strictly formal proof might or might not have been forthcoming had it been insisted on at the trial In the present instance it does not appear that the objection was taken at

(1) AIR 1948 PC 88

the proper time or that it would have been of any avail had it been taken

After these observations his Lordship went to discuss the merits and held that Parshotam Das was an ancestor of the plaintiff and an admission made by him was admissible as evidence against the plaintiff The document being registered Parshotam Das's name was not only given in the document but he had also been identified by two persons before the Sub Registrar and the question as to whether the document was registered by Parshotam Das or by an imposter was held to be a question of fact, the presumption being in favour of genuine In the case before us the question is not whether the defendant had laid foundation for leading secondary evidence As a matter of fact his right to lead secondary evidence was not challenged before us The question is whether the draft produced by him can be considered to be secondary evidence at all The question in this case is not of mere formal proof but of treating as secondary evidence papers which cannot be treated as secondary evidence under section 63 of the Indian Evidence Act It was when the defendant came into the witness box and stated that the papers filed by him were mere drafts that it could be known that they were not copies made from the original and compared with it These two documents must therefore, be ruled out as inadmissible

From the documentary evidence on the record therefore it appears that in the written statement filed on the 18th of October 1937 for the first time the plea was taken that the plaintiff had not disclosed the terms of the mortgage deed that the plaintiff had no right to lease out the mills for a period exceeding one year without the consent of the mortgagee The next date after the filing of the written statement is the 8th December, 1937, on which date the defendant gave notice to the

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plaintiff (Ex. 2) informing him that he had stopped working the mills with effect from 26th November 1937. On the 10th December 1937 the trial court decreed the plaintiff's suit no. 18 of 1937, for arrears of *thekha* money up to June, 1937. The defendant filed an appeal against that decision in this court and it was numbered and registered here as First Appeal no. 68 of 1938. On the 14th December 1937 the plaintiff sent a reply to the notice of the 8th December. It may be noted that in the notice of the 8th December no reason was given why the defendant had stopped running the mills from the 26th of November 1937. All that he said was that he had no mind to run the factory. In the reply the plaintiff pointed out that in case the defendant committed a breach of the contract he will be held liable for all losses that the plaintiff might suffer. On the 1st February 1938 the defendant sent a fresh notice in reply to the plaintiff's notice of the 14th December. Ex. 15. The following paragraphs of the notice of the 1st February 1938, one of importance as these, after the written statement for the first time make any mention of the non disclosure of the terms in the mortgage deed restricting the mortgagor's right to execute the lease for a period of more than one year:

> (*b*) That the execution of a *thekanama* was procured from him by use of fraud and misrepresentation and active concealment and exercise of and an undue influence and it is void and unenforcable.
>
> (*c*) That the said *thekanama* at all events is voidable at his option and he has exercised that option stopping the working of the Mill and asking you to take possession of the same.
>
> (*d*) That in no case you are entitled to give a lease for more than a year and that time having

expired, the lease has become *ipso facto* inoperative and you can no longer bind him

Learned counsel for the appellant has urged that after the mortgage, dated 10th January 1935 the mortgagor had no right to execute the lease and in view of the terms in the mortgage deed that he shall not let or lease out the mortgaged property for any period exceeding one year without the permission of the mortgagee in writing, the mortgagor could in no case grant the lease for a period longer than one year It is therefore urged that the lease itself was void and the defendant by repudiating it and refusing to continue in possession thereof had not committed any breach of the contract

The argument that the mortgagor after executing the mortgage has no right to execute a lease without the consent of the mortgagee is attempted to be supported by the observations in a decision of the Supreme Court in *Raja Komakshaya Narayan Singh* v *Chohan Ram* (1) Reference is made to a passage in the judgment of BHAGWATI J where the learned Judge said

> The question whether the mortgagor in possession has power to lease the mortgaged property has got to be determined with reference to the authority of the mortgagor as the bailiff or agent for the mortgagee to deal with the property in the usual course of management

Learned counsel has urged that their Lordships have held that the position of a mortgagor in possession even in the case of a simple mortgage is merely that of a bailiff or agent for the mortgagee and a bailiff or agent cannot without the consent of his principal deal with the property and in his case there being a restriction on the right of the mortgagor contained in the mortgage deed that he would not execute a lease for more than one year without the mortgagee's consent the mortgagor could not have executed a valid lease of the mortgaged property

(1) 1932 A L J 710

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Mahajan C. J.

We are afraid learned counsel has entirely misunderstood the decision of the Supreme Court. Their Lordships were dealing with a case where the question arose how far a lease executed by a mortgagor before the Transfer of Property Amendment Act of 1929 could bind the mortgagee, and in that connection their Lordships said that if the mortgagor had acted in a manner that it could be said that he was acting not only on his own behalf but also on behalf of the mortgagee then the mortgagee would be bound. The observations relied on by learned counsel therefore do not support

Reliance has been placed on a recent decision of the Court of Appeal in England in *Iron Trades Employers' Insurance Association v. Union of House and Land Investors Ltd.* (1), learned counsel has urged that no lease could be executed by the mortgagor without the written consent of the mortgagee. In this connection it must be remembered that the position of a mortgagor in possession in India is vitally different from the position of a mortgagor in possession in England as was pointed out by Ghosh in his book on Mortgages, Vol. I, P. 211 that

> the mortgagor in India does not part with the ownership of the property by pledging it to his creditor even by way of conditional sale and his position before closure is therefore wholly unlike that of an English mortgagor in possession of a mortgaged estate.'

Even in the case of a mortgage in England before the Law of Property Act 1925, the mortgagor had a right at common law to grant a lease though that lease would no doubt not be binding on the mortgagee. Such a lease though not binding on the mortgagee, was a valid lease between the mortgagor and the lessee. In the

(1) [1937] All E.R. 481

decision quoted by learned counsel this point is discussed at some length and the effect of the Conveyancing Act of 1881 on this common law right has also been dealt with The learned Judge FARWELL, J has said at page 484 that

> Under the law as it was before the Act of 1881 came into existence the position was that where there was a legal mortgage the mortgagor although in possession, had no power to grant a lease which could be binding on the mortgagee a lease would be good and the lessee would be en Except against the mortgage or against any person having a title paramount to the mortgagee such titled to the benefit conferred thereby but as against the mortgagee the lessee would have no estate or interest under the lease except that he had a right to redeem in the event of the mortgagee taking steps to evict him from possession of the property

As regards the effect of the Conveyancing Act of 1881, the learned Judge said that

> the effect of that statutory power would enable the mortgagor for the first time to do something which hitherto it had not been possible for him to do, namely to grant a lease during the continuance of the charge which would be binding on the mortgagee The fact that that power was given to the mortgagor does not and did not, in my judgment deprive the mortgagor of the right which he had apart from the Act altogether namely, to grant a lease to a third party without the consent of the mortgagee which would not be binding on the mortgagee, but would be binding as between the lessor and the lessee"

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Towards the end of the judgment after having discussed the law at some length, learned Judge summarised the position as follows:

> The power of leasing apart from the statute, as I have said, remains, and that must be taken to be the lessee as against his lessor is, of course entitled the lessee as against his lessor is of course entitled to the benefit of anything he can find in section 152, but the lessee would not be entitled, in my judgment to find in section 152 the right to say that although the power of leasing given by section 99 was not exercisable at all having regard to the circumstances nevertheless it must be duly exercised for the purpose of giving effect to the lease as against the mortgagee. The only effect of the lease was between the mortgagor and the lessee and it was not in any sense binding upon nor could it be operative against the mortgagees who could take any steps they thought fit to put an end to the occupation of the tenants."

So far as the mortgagor's position in India is concerned, there is no doubt that he remains the owner of the property and in case of a simple mortgage he also remains entitled to remain in possession thereof so long as the mortgagee has not brought a suit and obtained a decree and in execution of the decree his sold up the property. It cannot therefore be seriously urged that by reason of having executed a simple mortgage a mortgagor's right to grant a lease of his property comes to an end nor can it be argued that between the lessor and the lessee, the lessee is entitled to rely on the clause in the mortgage deed that the mortgagor shall take the consent of the mortgagee in granting lease and urge on that ground alone that the lessor had no power to grant the lease and the lease was void. The question however, whether such a lease by a mortgagor would

bind the mortgagee is another matter The Transfer of Property (Amendment) Act of 1929 tried to clarify the position in section 65 (A) of the Act by laying down in what cases a lease granted by a mortgagor lawfully in possession of the mortgaged property would bind the mortgagee Section 65 A does not mean, as has been urged by learned counsel, that a lease granted in contravention of the terms of section 65 A is a void lease as between the lessor and the lessee All that it provides is that if a mortgagor has executed a lease in accordance with the provisions of section 65A the lease will bind the mortgagee also subject of course to any contrary intention expressed in the mortgage deed itself The point that was therefore, urged in the lower court that the lease was not a valid lease at all and in any case, it could not be a lease for a period of more than one year and, after the expiry of one year it *ipso facto* came to an end and ceased to be operative has no force It was on this ground that lease was challenged in the lower court and the lower court rightly held against the appellant

We, however, asked the learned counsel for the respondent to satisfy us on a slightly different point that is whether the lessee was not entitled to avoid the lease on coming to know of the mortgage which jeopardised his position in this way that the mortgagee might have brought a suit on his mortgage and sold up the property and thus dispossessed the lessee Under section 108 (*c*) of the Transfer of Property Act (no IV of 1882 the lessor is deemed to contract with the lessee that if the latter pays the rent reserved by the lessee and performs the contract binding on the lessee, he is entitled to hold the property during the time limited by the lease without interruption In other words in this case the lessor guaranteed to the lessee quiet enjoyment for a period of ten years In so far as he gave the guarantee

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Malik C.J.

of quiet enjoyment for ten years the lessors title suffered from this defect that in case the mortgagee had filed a suit on the mortgage and obtained a decree for sale and sold up the property, the auction purchaser would have been entitled to dispossess the lessee

Two points arise in this connection, whether the fact that the property was subject to a mortgage which restricted the right of the mortgagor to grant a lease for more than one year, was disclosed to the lessee before the lease was executed as he might have in that case refused to take the risk of being turned out by the mortgagee before the expiry of ten years and the effect of such a clause on the lease itself Secondly, whether in this case the lessee had, after he came to know of those terms ever repudiated the lease on that ground in accordance with the provisions of section 39 of the Indian Contract Act Learned counsel for the plaintiff has, however, urged that these points were not taken in the lower court as there was no real danger of the lessee s possession being disturbed and the mortgagee has not even after all these years, brought a suit for his money and has not attempted to dispossess any of the lessees who got possession of the mills after the defendant had given up posession thereof Learned counsel has further urged that if the defendant had ever made any grievance of this fact and wanted further guarantee, the mortgagor could have either obtained the mortgagee's consent to the lease, or he might have redeemed the mortgage and without calling upon the mortgagor to do so, he could not straightaway treat the lease as inoperative and not of binding effect

As regards the first question we have already said that the mortgagor had a legal title to grant a lease of the property The lease therefore cannot be deemed to be void or illegal merely because it was not binding

on the mortgagee and there was some possibility that the whole period for which the lease was granted might have to be curtailed by reason of the action of the mortgagee It cannot be said that the mere non disclosure of the existence of the mortgage would necessarily have the effect of making the lease void

Sri *Jagdish Swarup* for the respondent has relied on section 3 of the Transfer of Property Act and has urged that the mortgage being a registered document the lessee must be deemed to have had notice of the same but if it was the duty of the lessor to have disclosed the defect in his title to the lessee the lessor cannot rely on section 3 and say that he is absolved from his liability to disclose the defect because the lessee must be deemed to have had constructive notice of the same To hold to the contrary would mean that under section 55 of the Transfer of Property Act, a vendor need disclose any defect in his title if the defect proceeds from his having executed a registered transfer prior to the date of the transfer in question We do not think section 3 of the Transfer of Property Act can help learned counsel

He has, however, urged that the case not having been fought on the lines suggested here, the question whether the defendant was informed of the mortgage was not properly gone into in the lower court Learned counsel has also pointed out that according to the defendant's own statement it was in August or September 1937 that he came to know of the mortgage in favour of Bhagwan Das and yet he continued to run the mill and did not stop its working till the 26th of November 1937 as admitted by him in the notice dated 8th of December, 1937

The question of law was not properly appreciated in the lower court, and the defendant did not allege

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that on coming to konw that the lessor could not guarantee ten years possession to the lessee and the lessee s possession was liable to be disturbed by the mortgagee enforcing his mortgage the contract of lease became voidable and the lessee had avoided the contract within a reasonable time after discovery of the truth and that he has ever since disclaimed any benefit and repudiated any liability under the contract (See Halsbury s Laws of England, Second Edition, Vol 23, page 120, paragraph 167) In Spencer Bower s Book on Actionable Non Disclosure, 1915 Edition, page 217 paragraph 246, it is pointed out that where the party complaining is on the defensive, it is incumbent on him to allege in his pleading that from the time when he first acquired knowledge of the undisclosed fact he has taken no benefit, exercised no right, made no claim, and recognised no interest or liability, under or in respect of the contract on which he is being sued '

As we have already said the plea taken in the written statement was that the contract was void for reasons given in paragraph 4 of the further pleas which was to the effect that the plaintiff has no right to give the Mills on lease for more than a year, without the written permission of the mortgagees The plaintiff, intentionally out of fraudulent and dishonest motives, concealed this fact and did not mention it to the contesting defendants Under the provisions of section 65 A and section 7 of the Transfer of Property Act, the lease aforesaid is contrary to law and is unenforceable ' Not only no plea was taken but it does not appear from the correspondence or the evidence that the defendant stopped running the Mill on the 26th of November, 1937 on coming to know of the mortgage There is also no explanation why the defendant continued to run the Mill till the 26th November, 1937, if he came to know

of the defect in August or September 1937 as was admitted by him There is further nothing to show that on coming to know of the mortgage the defendant ever required the plaintiff to secure him ten years quiet enjoyment under the lease by either getting the mortgagee s consent in writing or by redeeming the mortgage Reliance is placed on behalf of the plaintiff on section 39 of the Indian Contract Act (no IX of 1872) that a party to a contract has a right to put an end to the contract when the other party has refused to perform and disabled himself from performing his promise in its entirety and, as has already been said, it is urged that there was no real danger from the mortgagee and in case the lease wanted further satisfaction, the plaintiff if called upon would have been able to give that satisfaction

We have already said that it was for the first time that in the written statement in suit no 18 of 1937, a plea was taken based on this mortgage deed and even in that written statement, the plea taken was that the lease was invalid null and void and was not binding on the contesting defendant as the plaintiff had not disclosed to the contesting defendant that the site of the mill stood mortgaged to Bhagwan Das Bank It was not said anywhere that the defendant apprehended that he would not have quiet enjoyment for a period of ten years as guaranteed under the lease and without such guarantee he was not prepared to abide by the terms of the lease

It appears from the correspondence on the record that the defendant was not able to work the mill profitably and therefore, stopped working it on the 26th of November 1937 on the ground that he had been misinformed about the grinding capacity of the mill and that the mill was not in working order at the time when the lease was granted These points were

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raised in the previous decision as also in the written statement in this case and were made a subject matter of an issue on which the finding of the lower court is against the defendant The same points have also been raised before us and we shall deal with them presently We may, however, mention that it was not only not pleaded by the defendant that he would not have taken the property on lease if he had known that there was a risk of his not being able to enjoy quiet possession for ten years but learned counsel has failed to point out anything on the record to prove that the lessee would not have accepted the lease if he had known of the clause in the mortgage There is also nothing on the record to show that the defendant stopped the working of the mill on the 26th of November 1937, because he came to know of the term in the mortgage that the mortgagee would not be bound by a lease for a period of more than one year if his consent to grant such a lease had not been taken

In the lower court it was urged that there was a misrepresentation made to the defendant about the working capacity of the mill and the condition in which it was at the time when the lease was granted and the defendant was misled on both the points by the representation made by the lessor and by reason of this fraud or misrepresentation, the lease was not binding on him The same arguments have been advanced in this Court Reliance is placed on paragraph 16 of the lease which is as follows

> That the Second Party is entitled to grind 2,600 maunds of wheat in 24 hours in the said *kar khana*, that he is further entitled to keep the *kar khana* running for 24 hours or less"

And as regards the defective condition of the machinery, reliance is placed on the statemet of Mr Longdon recorded in the previous case on the 17th of November, 1937 copies of which have been filed by both the parties and have been exhibited as Exs 51 and A 10 In our view the lower court wrongly admitted the statement in evidence as the requirements of section 33 of the Indian Evidence Act were not fulfilled The plaintiff was not asked any question about Mr Longdon or his whereabouts and Deep Chand did not say that Mr Longdon was either dead or could not be found or was incapable of giving evidence, or was kept out of the way by the plaintiff or his presence could not be obtained without an amount of delay or expense which, under the circumstances of the case the court considered unreasonable Even if Mr Longdon s statement is admitted in evidence Mr Longdon only speaks of the condition in which the mill was when he took over charge in July, 1937 He admitted that he could not say the exact condition in which the machine was handed over to the lessee In the lease itself there is a covenant between the lessor and the lessee that the lessor was handing over the machinery in good condition and the lessee was taking possession of it in good condition that the lessee would be responsible for the running repairs, for other extraordinary repairs the lessor would be responsible, and that at the time of the expiry of the lease, the lessee would be responsible for the running repairs for other the lessor From this written agreement it must be assumed that the lessor and the lessee were both satisfied as regards the condition of the machinery at the time when the contract was entered into and there is nothing to show that there was any such latent defect in the machinery which would go to avoid the lease As a matter of fact the lessee worked the machinery for a period of more than one year and, according to the evidence on the record, other lessees have been working

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it since then. The defects that Mr. Longdon has pointed out are mostly the result of ordinary wear and tear which need periodic repair or replacement. Paragraph 10 of the lease is relied upon. Under that paragraph the lessee was given the right to grind 2,600 maunds of wheat in 24 hours and he was also entitled to run the mill for all the twenty-four hours. It is not in evidence that on any date the defendant worked the mill for 24 hours and got less than 2,600 maunds of wheat. The best evidence to prove the defendant's case would have been his own books of account which the lower court has rightly pointed out have not been produced. Reliance is placed on some oral evidence specially on the evidence of Hardwari Lal, P.W. 1, who said that:

> 'The average of the mill was about 2,200 or 2,300 maunds in 24 hours.'

Mr. Longdon in his statement said that:

> This machine turns out 95 maunds of total products per hour. This mill should produce 100 to 105 maunds per hour.

He was talking of the condition during the period when he was in charge or after July 1937. The figure given by Mr. Longdon works out to 2,280 maunds in 24 hours. Devi Chand no doubt said that when he ran the mill, it turned out 2,100 to 2,200 maunds in 24 hours as the machinery was defective but there is nothing to corroborate him that he ever worked the mill for 24 hours and got 2,100 or 2,200 maunds. We, therefore, agree with the finding recorded by the lower court that the defendant has failed to prove that there was either misrepresentation made as regards the capacity or the condition of the machinery.

The only other point that is left now is the question of damages and how much the plaintiff is entitled to

get from the defendant The rent reserved under the lease was Rs 25 000 a year On the 8th of December 1937 the lessee gave notice that he had stopped working the mill with effect from the 26th of November 1937, On the 18th of February 1938, the lessor got back possession of the property but in his reply dated 9th February, 1938, Ex 16 he made it clear that the lessee will remain liable for damages We have already said that the lessor had filed a suit no 18 of 1937 on the 22nd of July, 1937 for arrears of rent This case was finally decided by the High Court on the 12th of September, 1940, and the judgment of the High Court is Ex A 7 The learned Judges calculated the arrears of rent due up to the 24th of December, 1937, and passed a decree up to that date It is therefore the common case of the parties that nothing can be claimed up to the 24th of December 1937 The factory was leased out by the plaintiff to Lal Singh and another on the 5th of July, 1938 Under this lease the lessee was to work the mill from the 1st of August 1938 to 31st of July 1941, and the rent reserved was Rs 21 000 per year Lal Singh however, it was said entered into possession from the 3rd of August 1938 so that from the 25th of December, 1937 to 2nd of August 1938 the mill had not been let out and earned no income The damage claimed for this period was Rs 15 138 12 10 The lease in favour of Lal Singh was for a period of three years and the rent reserved during this period being only Rs 21,000 per year the plaintiff claimed damages at the rate of Rs 4 000 a year, that is Rs 12 000 in all On the 3rd of July, 1941, a fresh lease was executed in favour of firm Dewan Kripa Ram Radha Kishan and this lease reserved a rent of Rs 20,000 only and was for a period of one year commencing from the 21st of July, 1941 to the 20th of July 1942 For this year, the damages claimed were at the rate of Rs 5,000 per year Though the lease in favour of Dewan

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Kripa Ram Radha Kishan was only for a period of one year they continued in possession all along and have failed to deliver back possession of the mill to the plaintiff On the 8th of August, 1942 the plaintiff filed a suit against Dewan Kripa Ram Radha Kishan for ejectment being suit no 42 of 1942 The suit was decreed on the 8th of February, 1945 and a First Appeal no 264 of 1945 was filed in this Court and is till pending On the 10th of March 1945 after the suit for ejectment was decreed the plaintiff filed a suit no 20 of 1945 for mesne profits from the 8th of August 1942 and valued the suit at Rs 5,000 odd only The hearing of suit no 20 of 1945 has been stayed under section 10 of the Code of Civil Procedure, pending the decision of First Appeal no 264 of 1945 The lower court has held that the rent money payable to the plaintiff in accordance with the lease executed by Dewan Kripa Ram Radha Kishan being only Rs 20,000 a year for the rest of the unexpired period, i e up to the 24th of October, 1946, the plaintiff should get future damages at the rate of Rs 5 000 a year The amount decreed by the lower court is thus Rs 52 162 11 10

Learned counsel has raised two objections (1) that the figure worked out for a period of 12 days when it was said that the plaintiff had recovered rent money both from Lal Singh as also from Dewan Kripa Ram Radha Kishan was wrong and the surplus amount was not only Rs 526 1 but a little more Learned counsel had promised to work out the figures and give us, but they have not done so so far The other point raised is that for the period during which Dewan Kripa Ram Radha Kishan have been holding over after the expiry of the lease in their favour the amount payable by them should not be calculated at the rate of Rs 20,000 only but at a much higher figure The defendant had in the written statement taken two pleas, firstly that the plaintiff had

deliberately leased out the mill to Dewan Kripa Ram Radha Kishan at a low figure and that the mill should be let out for much more, and, secondly, that since the commencement of the Great War the lease money had at least doubled itself everywhere On the first objection the lower court decided in plaintiff s favour and pointed out that the lease was executed after proper advertisement through a reputed firm of brokers No arguments have been addressed to us on the point in this Court As regards the other plea, no satisfactory evidence was led to prove the allegations made in the written statement nor was the plaintiff and his witness cross examined on the point As a matter of fact not one question was put to the plaintiff whether he could not have let out the mill for a higher rent The defendant produced a witness Brahma Nand who has been disbelieved and to our minds rightly so Though the plaintiff was not asked a single question in cross examination after the close of plaintiff s evidence when the defendant came into the witness box he said that since the outbreak of the Great War the mills could be let out for Rs 40 000 to Rs 50,000 per year This obviously is incorrect The lease in favour of Dewan Kripa Ram Radha Kishan was executed on the 3rd of July 1941, and it fetched only Rs 20 000 If the point had been put in issue and question had been asked on the point learned counsel for the plaintiff has urged that he could have shown that on account of the Defence of India Rules and other controls, it was impossible for the plaintiff to have let out the Mill at a higher rate There is no satisfactory evidence to show that the mill could be let out at a higher rate and there is therefore no reason to interfere with the decision of the lower court on the point

In this connection it must be remembered that where there has been a breach of contract which was to run for several years and as a result of the breach

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the plaintiff claims damages the right to claim damages has accrued on the date of the breach, though, in determining the amount, the courts have to make an estimate of likely damage suffered by the plaintiff for the early termination of the contract and anticipate as best as they can what those damages are likely to be Though in case of a breach of contract the plaintiff is entitled as far as possible to be put in the same position as he would have been in case the contract had been carried out and get all such damages as naturally flow from the defendant's failure to perform his part of the contract and are not too remote, the plaintiff is under an obligation to mitigate the damages as far as possible As regards the damages actually suffered up to the date of the decree correct figures can be worked out but as regards the damages to suffered in the future, the estimate at best can be a rough one If the lease in favour of Dewan Kripa Ram Radha Kishan had been for the whole of the unexpired period up to the 24th of October 1946 the courts could with certainty find out the actual damage that the plaintiff had suffered It is impossible to say at this stage whether for the period after the expiry of the lease in favour of Dewan Kripa Ram Radha Kishan the plaintiff will get from him by way of mesne profits only at the rate of Rs 20 000 per year or more Even if it be assumed that the plaintiff would get a little more, on the other side there are many other facts and circumstances which have to be taken into consideration The suit was decreed on the 7th of August 1944 and the learned Judge rightly disallowed interest by way of damages up to the date of the suit in view of the decision of the Privy Council in *Bengal Nagpur Railway Company, Ltd* v *Ruttanji Ramji* (1) but the learned Judge has given no reason for disallowing *pendente lite* and future interest The suit was decreed on the 7th of August, 1944 On filing an appeal to this Court the defendant appellant

(1) 1938 A L J 159

applied for a stay of execution of the decree on the 2nd of November, 1944 A temporary stay was granted and notices were issued On 20th December 1944 the interim stay order was made absolute Even when granting the stay, the attention of the court does not appear to have been drawn to the fact that the decree holder by reason of the stay would suffer loss as he will not be able to get any *pendente lite* or future interest The result has been that the amount decreed on 7th August, 1944, on a suit brought on 27th November 1943, has remained unrealised up to date, for a period of almost ten years Learned counsel for the respondent asks us to allow him *pendente lite* and future interest, but no relief having been asked for to that effect in the cross objection filed on behalf of the plaintiff, we cannot grant the prayer In the cross objection a number of other items were claimed but learned counsel for the respondent has confined his argument mostly to publication and other charges incurred in mitigating the damage The plaintiff would, no doubt have been entitled to get the same, provided he had given satisfactory evidence to prove it We agree with the lower court that the evidence on point is not satisfactory

In the result the decree passed by the lower court is affirmed and the appeal and the cross objection are both dismissed with costs

Both appeal and cross objection dismissed

APPELLATE CIVIL

*Before Mr Justice Agarwala and Mr Justice Randhir Singh**

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February 2

MOHAMMAD SABIR ALI (PLAINTIFF)

v

TAHIR ALI AND OTHERS (DEFENDANTS)

Mohammadan Law—*Waqf alal—aulad—Delivery of possession and mutation of names, effect of—Mussalman Waqf Validating Act,* 1913 *ss* 3 *and* 4 *scope of—Oudh Estates Act,* 1869 *ss* 3 11 12 *and* 18 *scope of—Waqf, validity of*

F M the taluqdar of the Tipraha estate in Bahraich died in 1890 His younger brother *N B* succeeded him as taluqdar under the family custom and under the provisions of the Oudh Estates Act *N B* died in 1899 and was succeeded by his only son Asghar Ali who during his life time acquired certain other properties of taluqdari and non taluqdari character On 20th August 1925, Asghar Ali executed a waqf alal aulad and created a waqf of his entire property for the benefit of himself his family and descendants generation after generation He was the mutawalli for his life time and thereafter his second son Mohammad Umar defendant no 1 and after him his other sons and then his other descendants selected according to the rule of primogeniture Some amounts were to be paid to charities and as maintenance allowances to the members of his family generation after generation Asghar Ali died on 27th February, 1937 The plaintiff being the eldest son of the first son of Asghar Ali claimed succession to the property under the rule of lineal primogeniture but defendant no 1 being in possession of the property defended the suit as the mutawalli of the waqf of 1925

Held (1) that no delivery of possession is required in the case of waqf specially when the first mutawalli happens to be the waqif himself and no significance can attach to the omission to get the mutation of names effected after the waqf had been made

Mohammad Yasin v *Rahmat Ilahi* (1) relied on

(2) Where a waqif after making a *bona fide* waqf deals with the property as his own or puts the property in his

*Sitting at Lucknow

(1) I L R [1947] All 529

own use these acts of the waqif will only amount to a breach of trust and would not in any way affect the validity of the waqf if the waqf when made was otherwise valid

(3) That the reservation of the entire income of the waqf property may validly be made for the benefit of the waqif his family and descendants and such reservation is to be made for their maintenance and support not in the restricted sense in which he phrase Maintenance Allowance is used in s 60 Civil Procedure Code and s 6 of Transfer of Property Act but in a larger sense of personal use for all lawful purposes

Faqir Mohammad v *Mst Abda Khatoon* (1) *Abdul Karim Adenwalla* v *Rahimbai* (2) *Sundar Bibi* v *Raj Indar Narain Singh* (3) *Swami Govinda Rao Mohitay* v *N N C T C V Firm* (4) considered

(4) That the mode of alienation mentioned in s 11 of the Oudh Estates Act negatives the right of a taluqdar to alienate his property in any other way The attribute of transferability conferred by s 8 of the Act must naturally and necessarily have reference to the modes of transfer mentioned in s 11 If the transaction is not an alienation of the nature specified in Section 11 it cannot be made

Chandra Kishore Tewari v *Sissendi Estate* (5) relied on

(5) That a waqf alal aulad is a gift to God Almighty and is permissible to be made under the Oudh Estates Act provided it does not contravene the provisions of s 12 of the Act and provided further that it is in the form mentioned in s 18 of the Act

(6) That though the corpus of the waqf property is transferred to God Almighty yet its usufruct is transferred to unborn descendants of the waqif generation after generation The usufruct dealt with in such waqf is contrary to the provisions of s 12 of the Oudh Estates Act The transfer of the usufruct of an estate is a transfer of a right or an interest in such an estate

(7) That a gift for religious and charitable purposes contemplated in s 18 of the Oudh Estates Act is a gift covered by s 11 and therefore covered by s 12 of the Oudh Estates Act S 18 cannot be considered to be an exception to s 12 and all gifts for religious and charitable purposes must conform to the provisions of s 12

(8) That a waqf alal aulad is invalid because it contravenes the provisions of s 12 of the Oudh Estates Act

(1) A I R 1952 All 197
(2) A I R 1946 Bom 342
(3) (1921) I L R 43 All 617
(4) A I R 1935 Mad 815
(5) I L R [1949] All 531

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(9) That it would be violating the intention of the waqif to turn the waqf from a waqf alal aulad into a public waqf by applying the income of the waqf property to public and charitable purposes and the waqf must therefore be held to be invalid as a whole

First Appeal No 50 of 1946 against the decree of Sri Tribeni Prasad, Civil Judge of Bahraich, dated the 3rd May 1944

The facts appear in the judgment

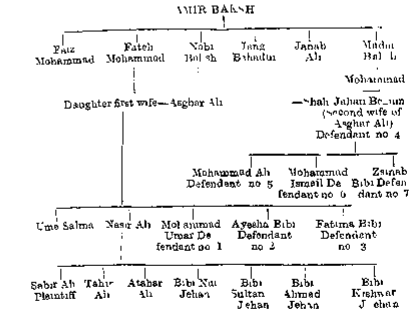
Niamatullah, for the appellant

Iqbal Ahmad and *Hyder Husain*, for the respondent

The judgment of the Court was delivered by—

AGARWALA, J —This is a plaintiff's first appeal from the judgment and decree of the Civil Judge of Bahraich and the subject of dispute in this appeal is the taluqdari and non taluqdari property of one Thakur Asghar Ali, who died in 1937

To appreciate the controversy between the parties, the following genealogical table which is not disputed will be of considerable assistance



Amir Bakhsh who owned considerable property known as Tipraha Estate in the district of Bahraich At the time of the annexation of Oudh, died during the Mutiny and was succeeded by his son Thakur Fateh Mohammad who was subsequently recognised by the Government as the taluqdar of the Tipraha Estate Thakur Fateh Mohammad died in 1890 without leaving any male issue and on his death his younger brother Nabi Bakhsh, succeeded him as taluqdar under the family custom and under the provisions of the Oudh Estates Act Nabi Bakhsh died in 1899 and was succeeded by his only son Thakur Asghar Ali Thakur Asghar Ali in his life time acquired certain other properties of taluqdari and non taluqdari character which are detailed in the schedules annexed to the plaint

On the 26th August 1925 Asghar Ali executed a deed of waqf alal aulad by means of which he created a waqf of his entire property for the benefit of himself his family and descendants generation after generation He was to be the mutawalli for his life time, and thereafter his son Mohammad Umar defendant no 1 and after him his other sons and then his other descendants selected according to the rule of primogeniture Some amounts were to be paid to charities and as maintenance allowances to the members of his family generation after generation

On the night of the 27th February 1937 Thakur Asghar Ali passed away leaving behind him the properties which according to the plaintiff, were those described in the Schedules A to I appended to the plaint On the death of Asghar Ali disputes arose about the succession to and possession of, his property. Defendant no 1 Mohammad Umar claimed to be entitled to the entire property as mutawalli under the waqf deed dated the 26th August 1925 while the plaintiff

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being the eldest son of Nasir Ali claimed succession to the property under the rule of lineal primogeniture. The Deputy Commissioner of Bahraich then stepped in and the properties mentioned in Schedules B, E, F and H were attached. The property mentioned in Schedule A was subsequently attached under the decree of the Sub-Divisional Magistrate, Bahraich, and the property mentioned in Schedule D was taken possession of by defendant no. 1 Mohammad Umar, the second and the then eldest surviving son of Asghar Ali. This was followed by a protracted litigation with regard to mutation of names in the Revenue Courts, and ultimately an order for mutation was passed in favour of Mohammad Umar, defendant no. 1. This order was confirmed by the Board of Revenue on the 13th May, 1939, and the properties mentioned in Schedules A, B, E, F and H were delivered to defendant no. 1.

Defendants nos. 4 to 7 are said to have obtained possession of item no. 2 of Schedule E and the bulk of the property in Schedule F, while defendant no. 2 is said to have entered into possession of item no. 5 of Schedule B and defendant no. 3 of item no. 1 of Schedule B.

Thakur Mohammad Sabir Ali, plaintiff, then instituted the suit, which has given rise to this appeal in *forma pauperis*, for the possession of the entire property left by Asghar Ali and for mesne profits on the allegations that he was the eldest son of Nasir Ali who also was the eldest son of Asghar Ali, and as such was entitled to succeed to the property of Asghar Ali under the rule of male lineal primogeniture in accordance with the Oudh Estates Act and the family custom. He denied the execution, attestation, genuineness and validity of the waqf deed alleged to have been executed by Asghar Ali and relied upon by defendant no. 1 for his title to

the property It was further alleged by the plaintiff tha the waqf deed if any had been obtained by a fraudulent misrepresentation, the details of which and the other grounds on which the validity of the deed is challenged, are mentioned in paragraphs 11 to 17 of the plaint The plaintiff also challenged the validity of the sale deed obtained from him by defendants 1 and 5 in respect of the bulk of the property on the assurance that they would finance and support the litigation which they had no intention to do

The defendants were therefore, said to be in wrongful possession of the entire property left by Asghar Ali and the plaintiff claimed to be the rightful owner of the property He claimed damages to the extent of Rs 5,000 and mesne profits to the tune of one lakh or any larger amount which might be found due An alternative prayer for arrears of maintenance, amounting to Rs 4,800 and possession of item no 2 of Schedule B attached to the plaint was also made in case the plaintiff was not found entitled to the relief of possession of the other property

The defendants contested the suit Defendant no 1 admitted the pedigree set up in the plaint, but alleged that it was incomplete A fuller pedigree was appended by him to the written statement He admitted that Thakur Asghar Ali succeeded Mohammad Nabi Bakhsh and thus inherited most of the property owned by Fateh Mohammad, but it was denied that Nabi Bakhsh, the younger brother of Fateh Mohammad, succeeded to his entire property on his death in 1890 It was asserted that the deed of waqf alal aulad executed by Thakur Asghar Ali on the 26th August, 1925, was duly executed, registered and acted upon and that no fraud, undue influence or coercion as alleged by the plaintiff had been practised upon him It was further alleged that

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even if the waqf was held to be invalid, it would still be operative as a will, and defendant no. 1 was entitled to succeed to the whole of the estate of Asghar Ali as his successor. A plea of limitation was also raised. Defendants 2 and 3 adopted the written statement filed by defendant no. 1. The defence of defendants 5 and 6 was that they were the owners of the property mentioned in Schedule D, and of items 2 and 3 of Schedule E. They also supported defendants 1 to 3 with regard to the genuineness and validity of the waqf deed. Defendant no. 7 adopted the written statement filed on behalf of defendants 5 and 6. Defendant no. 4 maintained that the sale deed executed by the plaintiff in his favour was valid and binding and that the plaintiff was not entitled to recover the properties comprised in the sale deed.

The lower court found that the waqf deed dated the 26th August, 1925, was duly executed by Thakur Asghar and was a perfectly genuine and valid document and as such binding upon the parties. It held that Thakur Nasir Ali was the eldest son of Asghar Ali and the plaintiff being the eldest son of Nasir Ali was entitled to inherit only such property as was left by Asghar Ali at the time of his death by virtue of a family custom and under the provisions of the Oudh Estates Act. The plaintiff therefore succeeded in his claim only in respect of such properties as were not the subject of waqf, viz. item 17(*b*) and 17(*c*) of Schedule A of the plaint. He was not found entitled to any mesne profits or damages but his claim to recover Rs. 2,785/12/6 as arrears of *guzara* from 1st March 1937 to 1st March 1944, under the terms of the waqf deed was upheld. The plaintiff's right of residence in Kothi Madanjot entered in item no. 2 of List B was also found substantiated.

The issues relating to the character of the various items of property were also decided by the lower court, but it is not necessary to mention its findings as the findings on these issues have not been challenged in argument in appeal Dissatisfied with the judgment of the court below the plaintiff has come up to this Court in first appeal

During the pendency of the appeal, Mohammad Umar defendant no 1 and Mohammad Ali defendant no 4 have died and their heirs have been brought on the record In this appeal the only points argued before us relate to the genuineness and validity of the waqf deed executed by Asghar Ali The waqf alal aulad has been challenged on three grounds

> (1) That Asghar Ali never intended to create a genuine waqf and that it was a paper transaction never intended to be given effect to, (2) that it is invalid because it is contrary to the provisions of Mohammedan Law, and (3) that it is contrary to the provisions of the Oudh Estates Act and therefore, invalid

The first point which we propose to deal with at the outset is, if Asghar Ali did, as a matter of fact make a genuine and *bona fide* waqf alal aulad The due execution and due attestation of the waqf having been established and not being challenged in this appeal the onus lay upon the plaintiff to prove by cogent and convincing evidence that the deed was a colourable or a fictitious transaction The oral evidence led by the plaintiff on this point comprises of the solitary testimony of one Mohammad Shafi (P W 2) who served Asghar Ali as a *moazzin* in his mosque for a brief period of fifteen months in 1924 25 He states that once in the rainy season of 1925, Mohammad Umar

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defendant came to Asghar Ali and told him that Nasir Ali had applied for the estate to be taken over by the Court of Wards, and Mohammad Umar took Asghar Ali inside the house. In cross-examination the witness admitted that Asghar Ali did not inquire of Mohammad Umar the source of his information nor did he make any comment. Asghar Ali is a prudent man, would have naturally made some inquiries to find out if the information conveyed to him by Mohammad Umar was correct and it is difficult to believe that this slender and unverified piece of information should alone have created in the mind of Asghar Ali a belief that Nasir Ali, his eldest son, had turned against him and had been making efforts to divest him of his property. No application was made by Nasir Ali to the Government, and there is no documentary evidence on the record to prove that Nasir Ali had any such sinister motive as is sought to be attributed to him.

As against the solitary testimony of Mohammad Shafi, the defendant has examined some respectable witnesses in rebuttal. Nawab Newazish Ali Khan, taluqdar of Allahabad Estate, Bahraich, who is an important witness on this point, states that his house was close to the house of Asghar Ali and that he had intimate relations with him. He was on visiting terms with Asghar Ali. He further states that in May, 1925, Asghar Ali had a talk with his uncle, the late Nawab Mohammad Ali Khan, C.S.I., in his presence and that it was in connection with the creation of a waqf-al-aulad. Asghar Ali wanted to preserve the property from being wasted by his sons and asked for suggestions from Nawab Mohammad Ali Khan. Nawab Mohammad Ali Khan made some suggestions but the only suggestion which appealed to Asghar Ali was the creation of a waqf-al-aulad. Ultimately, according to the statement of this

witness, Asghar Ali decided upon creating a waqf-ahl-aulad with successive life estates to various persons. He also showed a draft of the proposed waqf-ahl-aulad to the witness and told him that the draft had been prepared by vakils. Two or three days after this talk with the witness Asghar Ali came to the uncle of the witness at about 5 or 6 p.m. and told him that he had got the waqf deed, which was decided upon, registered. Ghulam Husain Khan (D.W. 4), is another witness. He was a life Magistrate and paid Rs.3,000 as land revenue. He states that he knew Asghar Ali who was a friend of his and that he had once told him that he had an idea of creating a waqf-ahl-aulad in order to safeguard the property from alienation and for charitable purposes and that five or six months later he told him that he had created the waqf-ahl-aulad. Raja Brijendra Bikram Singh, taluqdar of Partapur, states that he was on visiting terms with Asghar Ali, taluqdar of Tiparha and that during the course of a talk on affairs of the estate generally he had told him that in order to save his property from being squandered away by his successors he had created a waqf-ahl-aulad. This witness was a hereditary Raja and paid about two lakhs as land revenue.

The statements of these witnesses clearly show that the story that there was an apprehension in the mind of Asghar Ali that his property was likely to be taken over by the Court of Wards and that the waqf was only a paper transaction created as a smoke screen to save the property from being taken over by the Court of Wards was wholly unfounded. The evidence further shows that Asghar Ali had a religious bent of mind and was both prudent and sagacious. The fact that Asghar Ali amassed considerable wealth and made considerable acquisition of property in his life-time is

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also a pointer in the same direction. It is, therefore, no wonder if the idea of safeguarding the property which he had built up, against dissipation in the hands of his successors, was uppermost in his mind.

Reliance has also been placed on some documentary evidence relating to the course of conduct and dealings of Asghar Ali with regard to the property subsequent to the making of the waqf. They are copies of some plaints and written statements in which Asghar Ali described himself as the proprietor of the property even after he had executed the waqf. Ex. 18 is a copy of a plaint in a suit instituted by Asghar Ali in the Court of the Munsif, Karaiganj, for damages to the tune of Rs.100. In paragraph 1 of the plaint Asghar Ali described himself as the owner of village Ramgaon. Ex. 132 is a copy of a plaint in a suit instituted by His Highness the Maharaja of Kapurthala against Asghar Ali for the possession of some land alleged to have been encroached upon by Asghar Ali. In paragraph 9 of the written statement Ex. 133 Asghar Ali described himself as the owner of village Gondhi Basabi which was also included in the waqf deed.

It has also been urged that no mutation was effected in favour of the waqf after the waqf deed had been executed. It is to be borne in mind that Asghar Ali appointed himself as the first mutawalli under the waqf deed and reserved to himself the right to appropriate and use the entire usufruct of the property in any manner he liked for his own benefit for the benefit of his dependants and for charitable purposes. It is, therefore, not at all surprising if he did not think it necessary to apply for mutation or did not make any distinction in calling the property lately as his own even after the waqf had been created. Moreover, the subsequent conduct of a transferee in dealing with the

transferred property may be relevant only if it is of material assistance in establishing the nature of the transaction or the intent of the transferor in entering into the transaction. But the subsequent conduct may also be the result of a subsequent change in design in which case such subsequent conduct will not adversely affect the validity and genuineness or minimise or nullify the operative effect of a *bona fide* transaction made earlier.

The defendant has also filed a copy of an application made on behalf of Asghar Ali by his general agent Chattrapal Singh on the 15th December 1923 in suit no. 38 of 1928, in which the existence of the waqf-ul-aulad has been clearly admitted.

Lastly, it has been urged that Asghar Ali himself filed a suit for a declaration that the waqf deed was a fictitious transaction a few months before his death and this lead to the conclusion that the deed was in fact a fictitious transaction. This suit was pending when Asghar Ali died and was ultimately withdrawn by his successors. It is difficult to find on the basis of this circumstance that the deed was fictitious. Evidence has been led to prove that during the last years of his life his relations with his son Mohammad Umar became strained and he did not like the idea of Mohammad Umar succeeding him as mutawalli and it was to give effect to this displeasure that he instituted a suit for a declaration about the invalidity of the waqf deed. Nawab Nawazish Ali Khan and Ghulam Husain Khan state that the suit was the outcome of a disagreement between Asghar Ali and his son Mohammad Umar and that Asghar Ali never intended to prosecute the suit and had definitely told Nawazish Ali Khan that he would withdraw the suit. What the exact intention of Asghar Ali was in filing the suit it is difficult to know or judge. Even if Asghar Ali changed his

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mind and decided upon cancellation of the waqf deed it would not lead to the conclusion that he had no intention of making a *bona fide* waqf when he created the waqf alal aulad.

A number of rulings have been cited at the bar in support of the contention that a waqf becomes complete when a declaration to that effect is made by the waqif and no delivery of possession is required. It is unnecessary to refer to all these rulings in view of the Full Bench decision of this Court in *Mohammad Yasin* v. *Rahmat Ilahi* (1) in which the view has been endorsed. No delivery of possession is therefore required in the case of a waqf especially when the first mutawalli happens to be the waqf himself and no significance can attach to the omission to get the mutation of names effected after the waqf had been made. Even if a waqif after making a *bona fide* waqf deals with the property as his own or puts the property to his own use these acts of his will only amount to a breach of trust and would not in any way affect the validity of the waqf if the waqf when made was otherwise valid.

We are therefore satisfied that Asghar Ali executed a waqf alal aulad with due formalities with regard to execution and attestation and that he did so of his own freewill and with a *bona fide* and genuine intention of creating a waqf.

The waqf in question was next challenged for the reason that it was contrary to the provisions of the Mohammedan Law. This objection was based on three grounds, firstly, because the waqf does not provide for an ultimate gift to charity as required by law, secondly because there is no express transfer of the corpus to God, and thirdly, because the waqif reserved

(1) I.L.R. [1947] All. 520

for himself the entire income for his life time and thus went beyond the provisions of Muslim Law which only authorises reservation of amount for the maintenance and support of the waqif and his descendants

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Before we deal with these and other arguments of law the concept of property under the Mohammedan Law and the essential characteristics of a waqf must be borne in mind Muslim Law does not recognise the splitting up of ownership of land into estates distinguished in point of quality like legal and equitable estates, or in point of duration like estates in fee simple in tail for life or in remainder What Muslim Law does recognise and insist on is the distinction between the corpus of the property itself (ain) and the usufruct in the property (manfa) Over the corpus of property the law recognises only absolute dominion heritable and unrestricted in point of time and where a gift of the corpus seeks to impose a condition inconsistent with such absolute dominion the condition is rejected as repugnant but interests limited in point of time can be created in the usufruct of the property and the dominion over the corpus takes effect subject to any such limited interests—vide *Sardar Nawazish Ali Khan v Sardar Ali Raza Khan* (1) Consistently with the above conception of property a waqf is according to Abu Yusuf whose opinion has been accepted in India in this matter, an absolute transfer of ownership from the waqif to God Almighty for the purpose that its usufruct shall be applied to purposes recognised by Mohammedan Law as religious and charitable

Wakfs are of two kinds—public and private The corpus of the property in both kinds of waqfs vests in God The usufruct of the property in a public waqf is mainly devoted to religious and charitable objects

(1) (1917 19) L R 75 I A 62 p 77

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benefiting the public at large as the poor. In a private waqf which is called waqf alal aulad the income of the property is mainly devoted for the benefit of the waqif, his family and his descendants generation after generation. It is a peculiarity of Mohammedan Law that the maintenance and support of one's self and one's heirs and family is considered a religious and charitable purpose and property can be tied up in perpetuity for such a purpose although under the ordinary law, such tying up of property would be unlawful. At one time it was held that unless a waqf provided for a substantial benefit for religious and charitable purposes the tying up of the property even for the benefit of the descendants of the waqif was invalid—*vide Sheikh Mohamed Ahsanulla Chowdhry* v. *Amarchand Kundu* (1) *Abdul Gafur* v. *Nizamuddin* (2), and *Abdul Fata Mohammad Ishak* v. *Russomoy Dhur Chowdhry* (3). Section 3 of the Waqf Validating Act (VI of 1913) however, declared that it was lawful for a Hanafi Muslim to create a waqf for the maintenance and support wholly or partially of himself his family his children or his descendants provided that the ultimate benefit is in such a case expressly or impliedly reserved for purposes recognised by the Mohammedan Law as religious and charitable. Section 4 of the Act declares that such benefit for religious and charitable purposes could be postponed until after the extinction of the family children or descendants of the waqif.

The question is whether the waqf in suit makes no provision for charity after the extinction of the line of the waqif's descendants?

The waqf in question mentions that it was made under the provisions of Act VI of 1913 to create a per

(1) (1889-90) L.R. 17 I.A. 28. (2) (1891-92) L.R. 19 I.A. 170.
(3) (1894-95) L.R. 22 I.A. 76.

petual waqf for himself for his issue and for charitable purposes The charitable purposes mentioned in para 3(a) (b) and (c) are—

(a) to clean and make repairs of the mosque mentioned therein

(b) payment to pilgrims to Mecca and

(c) sacrifice on Baqr Id day and help of the poor and promising Muslim students

In paragraph 22 it is mentioned that If God forbid at any time there be none entitled to the office of mutwalli ship according to the terms mentioned above, then the waqf property shall be transferred to the Treasurer of Charitable Endowments and the Government shall have the power to make proper arrangements to spend the income for those religious purposes which have been mentioned in para 3 clauses (a) and (b) It is therefore, clear that there is an ultimate bequest for charity It is not necessary to consider the point that even if there was no express mention of the ultimate bequest to charity on failure of the line of the descendants of the waqif such a gift would be implied by the mere fact that a waqf had been created

Is the waqf in suit bad because it does not transfer the ownership of the property to God?—

It is indeed, true that there is no express mention in the deed of waqf that the corpus of the property is being transferred to God, but the law does not require such express mention The definition of waqf in Act VI of 1913 does not require that there should be an express transfer of the corpus to God From the fact that a waqf has been created for the purposes which are considered by the Mohammedan Law to religious and charitable it is implied that the waqif has transfer

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red the ownership of waqf property in perpetuity to God Almighty

The question whether the waqf is invalid because the waqif has reserved to himself the power to spend the income of the property in whatever manner considered proper by him, is next to be considered Paragraph 1(a) of the waqf provides

> That for my life time I shall be the mutawalli and I shall have the power to spend the income of the property in whatever manner considered proper for myself my issue and relations and for charitable purposes

The phrase for himself, his heirs and relations clearly means for the maintenance and support of himself his heirs and relations

The Waqf Validating Act VI of 1913 does not prescribe any amount or proportion of the income of waqf property that may be reserved by a waqif for the maintenance and support of himself, his family and descendants The entire income of the waqf property may be reserved for this purpose The words wholly or partially in section 3 of the Act have reference to the income of the waqf property and not to the maintenance and support of the waqif and others When the entire income is thus reserved for the waqif his family and children it matters little whether the words employed are maintenance and support" or, 'use' or benefit or the like Both these expressions are indiscriminately used by Mohammedan jurists as meaning one and the same thing Ameer Ali has collected the various views of the jurists on this subject at pages 281 to 295 of Volume I of this Mohammedan Law, 4th Edition

> 'Dar Kutni reports from Jaabir that the Prophet (may God's blessings be with him) declared that

a man providing subsistence for himself his children and his people and for the maintenance of his and their position, is giving charity in the way of God'

Tibrani has reported from Imama that the Prophet of God declared that a man making a provision for his (own) maintenance or that of his wife, his family or children, is giving *sadakah* And in the *Sahih* of Muslim it is stated from Jaabir that the Prophet told a man to make a beginning with himself and give the remainder to his family (Ameer Ali's Mohammedan Law 282)

In Fatawai Kazi Khan it is stated A person makes a waqf for the poor and conditions that the entire (produce) will be for him, and says that it will be lawful for him to eat out of it, Abu Bakar Askaf holds such (waqf) to be valid Again if a man were to say I have made this waqf on myself, it is valid according to Abu Yusuf, and on his death it will be for the poor Or if he were to make a waqf on the mothers of his children it would be as valid as the waqf on himself

Ansari has stated in his work on waqf that when a person constitutes a waqf in the following terms

'This my land is waqf for the sake of God in perpetuity and its produce will be applied to my *uses as long as I live*' and adds nothing further, it is valid, and when he dies its benefit will go to the poor" (Page 283)

'Radd ul Mukhtar—If a person were to make a waqf and reserve the produce or the governance of the trust for himself it would be valid according to Abu Yusuf and on that is the Fatwa'

Fatawai Alamgiri— When a man has made a

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waqf of land or something else with a condition, that the whole or part of it shall be for himself while he lives and after him for the poor, the wakf if valid according to Abu Yusuf, and the jurists of Balkh have adopted his opinion and ruled accordingly and the Fatwa is in conformity with that opinion as an inducement to the making of wakfs

Again If the wakif were to say This is a sadakah mowkoofa to Almighty God and he the mutawalli, will pass its produce to me while I live without adding anything more, it would be lawful, and after his death, the benefit will go to the poor (Page 284)

Ramzul hakaik of Allamah Aini— If the wakif reserves the produce of the wakf for himself that is if he makes it a condition in the wakfnamah that during his lifetime the produce should be applied for his benefit and after his death to the benefit of so and so or any specific object such a wakf is valid according to Abu Yusuf and the Mashaikh (jurists) of Balkh have decided on that rule

Ghait ul Bayan— If a man reserves the income of the wakf for himself or the governance thereof it is valid according to Abu Yusuf And Ulu Iwalji has stated in his Fatwa that the jurists of Balkh have accepted the rule laid down by Abu Yusuf and Sadr ush Shahid also decided in accordance therewith Therefore, if he conditioned the whole for himself during his lifetime and after it for the poor, it will be valid '

Tashil— Abu Yusuf has held it lawful for the wakif to make a condition that the profits either in whole or in part should be for himself for his life and on this is the Fatwa "

Wajiz ul Muhit— If a person makes a wakf for himself, or for the mothers of his children, or for his own children, or makes a wakf of mushaa, it is lawful (Page 286)

Duri ul Mukhtar— If a person makes a wakf on *himself*, his children, descendants and posterity, and reserves the income for himself during his life time and similarly thereafter, and thereafter, it is valid according to Abu Yusuf and on this is the Fatwa (Page 287)

Radd ul Mukhtar— It is lawful to reserve the produce of the wakf for *one's self* according to Abu Yusuf

According to Zailye, one of the greatest of Hanafi jurists whose authority is recognised as undisputable throughout the Sunni world If a man constitute a wakf with these words, this my land is a *sadakah mowkoofa* for my children or my *nasl* (descendants) it is valid according to both Abu Yusuf and Mohammad

The same rule is enunciated in the Durrar ul Ahkam and the Mawahib If a person appoints the usufruct for himself during his life-time and thereafter, and thereafter, it will be lawful according to the second Imam Abu Yusuf and on this is the Fatwa

Majmaaul Anhar— A wakf in favour of *one's self* is valid according to Abu Yusuf, and on this is the Fatwa (Page 292)

It appears to us that the reservation of a wakf of the entire income for the use of himself and his descendants is for their maintenance and support within the meaning of the Act This view finds support from the observations of MALIK, C. J., in *Faqir Mohammad* v. *Mst Abda Khatoon* (1) The other learned Judge in the above case followed the view of CHAGLA J. (as

(1) A I R 1930 All 127

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he then was) in *Abdul Karim Adenwalla* v. *Rahimabai* (1) CHAGLA, J. observed that when a wakif reserves the entire income for his use he is creating a life interest in the usufruct for his own benefit, and that there was a difference in law between creating a reservation of life interest in the income and securing to oneself the whole of the income of the trust property for his maintenance and support. With all respect we find ourselves unable to agree with this view. The reservation of the whole of the usufruct of a particular property for the lifetime of a person or persons is creating an interest for life or life interest in the usufruct in favour of that person or those persons. It is wholly immaterial that this reservation is for their maintenance and support or not. The creation of a life interest in the usufruct of a property is valid according to Mohammedan Law and a waqf alal aulad does create a life interest in the usufruct in favour of the waqif and his children. When the profits of the waqf property are to be reserved for the wakif or his children it is intended that they are for their maintenance and support. The words 'maintenance and support' are not to be limited to the necessities of life. The phrase includes maintenance of one's position in life. When a certain income is reserved for one's maintenance and support, he is free to use it in any way he likes and the law imposes no check on the use of it. The question whether the income so reserved is attachable and saleable for satisfaction of one's debt is quite a different matter. In *Abdul Karim Adenwalla*'s case CHAGLA, J. (as he then was) went on to observe:

> If what he had reserved to himself was for his own maintenance that would not be transferable as property under the Transfer of Property Act nor could it be attachable under the provisions of

(1) A.I.R. 1946 Bom. 342

the Civil Procedure Code Whereas if he had reserved for himself a life interest, that particular provision would not attract to itself the provisions of section 6, Transfer of Property Act, and section 60, Civil Procedure Code, with regard to non transferability and non liability to attachment contained in the provisions of the two sections

Under clause (*n*) of section 60, Civil Procedure Code, a right to future maintenance is not attachable and sale able and under clause (*d*) of section 6 of the Transfer of Property Act, a right to future interest is not transfer able The right to future maintenance spoken of in these two sections means a right of a person to receive from another boarding, clothing and other necessary supplies (1) In other words it means a bare right to maintenance (2) The amount will naturally differ according to the position in life of the person concerned There is no such restriction in section 3 of the Waqf Validating Act because the section provides that the income of the waqf may be reserved wholly or partially for the support and maintenance of the waqif his family and descendants In our opinion the reservation of the entire income of the waqf property may validly be made for the benefit of the waqif, his family and descendants and such reservation is to be made for their maintenance and support not in the restricted sense in which the phrase Maintenance allowance' is used in section 60 Civil Procedure Code and section 6 of Transfer of Property Act but in a larger sense of personal use for all lawful purposes The same remarks apply to the provision of paragraph 11 in the deed of waqf which is as follows

(1) Sivaji Gownda Rao Mohitey v N N C T V Firm A I R 1935 Mad 815

(2) Sunder Bibi v Raj Indar Narain Singh (1921) I L R 43 All 617

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> That the mutawalli of the waqf shall have the absolute power to spend whatever shall be saved from the income of the waqf property after defraying all the expenses relating to this deed,

and we think that this provision also is consistent with section 3 of the Waqf Validating Act, 1913.

We now come to the more difficult point in this case, and it is whether the waqf in question is invalid by reason of the provisions of the Oudh Estates Act (I of 1869).

The relevant provisions of the Act are as follows:—Section 2 defines transfer as an alienation *inter vivos*. Section 3 provides that a Taluqdar with whom a—

> summary settlement of the Government revenue was made between the 1st day of April 1858 and the 10th day of October 1859 or to whom, before the passing of this Act and subsequently to the 1st day of April 1858 a taluqdari sanad had been granted was to be deemed to have thereby acquired a permanent heritable and *transferable* right in the estate.

Then follow the provisions relating to powers of taluqdars to transfer and bequeath their estates or any right or interest therein. Section 11 provides as follows:

> Subject to the provisions of this Act and to all the conditions other than those relating to succession under which the estate was conferred by the British Government, every taluqdar and grantee, and every heir and legatee of a taluqdar and grantee of sound mind and not a minor, shall be competent to transfer the whole or any portion of his estate or his right and interest therein during his lifetime by sale, exchange, mortgage, lease or gift and to bequeath by his will to any person the whole or any portion of such estate, right and interest.

Section 12 of the Act provides—

> No transfer or bequest under this Act shall be valid whereby the vesting of thing transferred or bequeathed may be delayed beyond the lifetime of one or more persons living at the decease of the transferee or testator and the minority of some person who shall be in existence at the expiration of that period and to whom if he attains full age the thing transferred or bequeathed is to belong

Section 18 of the Act is as follows

> No taluqdar or grantee and no heir or legatee of a taluqdar or grantee, and no transferee mentioned in section 14 and no heir or legatee of such transferee shall have power to give his estate or any portion thereof or any interest therein to religious or charitable uses except by an instrument of gift signed by the donor and attested by two or more witnesses not less than three months before his death and presented for registration within one month from the date of its execution and registered

The contention of Chaudhri *Niamatullah* who appears for the appellant may be stated thus First since a waqf is a transfer of property from the waqif to God Almighty and God Almighty is not a living person therefore a waqf is not a transfer *inter vivos* within the meaning of word transfer in the Oudh Estates Act and does not fall within any of the kinds of transfers mentioned in section 11 The Act being exhaustive of the modes in which an estate can be alienated no waqf at all can be made Secondly even if a waqf can be made under section 11 only a waqf of a public character can be made and no waqf-ulal aulad can be made at all because thereby interests in the property are created in favour of unborn persons

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generation after generation, which is prohibited by section 12 of the Act. As regards section 18, the learned counsel urged that it deals with the mode in which gifts for religious or charitable purposes can be made and does not modify section 12 which must apply even to gifts for charitable and religious purposes. On the other hand, Mr. *Iqbal Ahmad*, the learned counsel for the respondent urged that the Act is not exhaustive of all kinds of alienations. It deals with transfers *inter vivos* only, namely, with transfers to living persons. A waqf being an alienation of property to God Almighty who is not a living person, is not a transfer within the meaning of section 11 of the Act or of section 12 and, therefore, neither section 11 nor section 12 applies to such alienation. The Act therefore does not provide for such an alienation and as it is valid under the Mohammedan Law to which law the waqif was subject it must be held to be valid. Secondly, even if the waqf is hit by sections 11 and 12, it is saved by section 18 of the Act which must be read as an exception to those sections. Thirdly, Mr. *Iqbal Ahmad* contended that in a waqf the property is transferred to God in whom it remains for ever and therefore, no limited estates in favour of unborn persons are created, and that, therefore section 12 can have no application. Fourthly he contended that the waqf is not governed by section 12 because section 12 prohibits the transfer of an estate and not its usufruct. According to him, the usufruct of an estate is not an estate at all. Lastly, he contended that, at any rate, the waqf is valid in so far as the vesting of the usufruct in favour of the persons in existence on the date on which Asghar Ali died is concerned.

The first question to be considered is whether an alienation of a taluqdari estate can be made which is not governed by the provisions of the Act.

The history of taluqdari estates has been narrated in numerous cases and it is not necessary to repeat it Suffice it to say that after the Mutiny of 1857 had been quelled, Lord Canning, the then Governor General of India issued a proclamation on the 15th March, 1858, declaring a general confiscation of all proprietary rights in the soil of the Province of Oudh (with the exception of the rights of a few taluqdars) and at the same time promising indulgence to those who promptly surrendered Most of the taluqdars did surrender and received back their estates and those who did not lost them and their estates were given to those who had proved loyal to the British Government as reward for their loyalty This was done by making settlements with them and issuing sanads to them Thus all the pre existing rights of the taluqdars were first taken away, and then fresh Government grants under the terms of sanads and proclamations which were made at the time were made The rights of taluqdars in respect of such estates were further defined by the Oudh Estates Act of 1869 Two principles may be noted in connection with this Act First, that the rights of taluqdars and grantees to whom estates were granted by the Crown are defined in the Act without distinction of religion or caste The personal law of a taluqdar does not enter into the picture except in so far as the Act itself imports it and secondly that in respect of the matters dealt with by the Act it is a self contained and complete Code In *Chandra Kishore Tewari* v *Sissendi Estate* (1) the Privy Council observed

> The Oudh Estates Act is a special Act affecting special class of persons in respect of the properties conferred upon them The Act is self

(1) A I R 1940 P C 207

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contained and complete in regard to the matters contained in it

Section 8 of the Act states that a taluqdar was deemed to have acquired a permanent, heritable and transferable rights in his estate The other provisions of the Act dealing with transfer defines the nature of the transfers and the mode in which they could be made Section 11 defines what transfers can be made These transfers can be by way of sale exchange, mortgage, lease or gift If a taluqdar could make any other kind of alienation there was no necessity of mentioning that he could transfer his estate by sale exchange mortgage lease or gift The principle *expressio unius, exclusio alterius* applies The mode of alienation mentioned in section 11 negatives the right of a taluqdar to alienate his property in any other way The attribute of transferability conferred by section 8 of the Act must naturally and necessarily have reference to the modes of transfer mentioned in section 11 If the transaction is not an alienation of the nature specified in section 11, it cannot be made

This brings us to the consideration of the question whether a transfer in favour of God Almighty in Mohammedan wakf is an alienation *inter vivos* within the meaning of the word transfer as defined in the Act and whether it is a gift within the meaning of section 11 of the Act In our opinion God under the Mohammedan Law, is a juristic person capable of holding property The very conception of waqf shows that God is capable of holding property In a waqf the corpus' is held in the ownership of God and the usufruct is applied for the benefit of individuals or purposes as directed by the deed of gift God is not a living person in the manner of human beings but according to the belief of Mohammedans He has His own personality as the Creator of the world as the

all powerful, Omniscient and Omnipresent Being pervading the Universe and controlling it As Mohammedan Law does not recognise the ownership of any property to remain in a vaccum, that ownership must remain somewhere It is for this reason that the corpus of the property in a waqf according to Abu Yusuf vests in the ownership of God This view is supported by the opinion of Sir SHAH SULAIMAN (1), who sitting with KENDALL J held that a dedication in favour of God is a transfer governed by the Transfer of Property Act as God is a juristic person True it is that a juristic person is not a living human being and the fact that for some purposes the law invests inanimate objects with the rights of persons would not make juristic persons living persons for *all* purposes But if the law makes them capable of holding property there is no reason why a transfer *in presenti* cannot be made in their favour A transfer *inter vivos* within the meaning of the Transfer of Property and the Oudh Estates Act is not confined to transfers taking place between one living human being and another living human being We are of opinion that the phrase living persons within the meaning of these Acts simply means an entity which has a personality of its own which exists and which has the capacity of holding property according to law Under the Hindu Law Idols' have been held to be such entities to whom transfers can be made (2) In *Tangella Narasimha* v. *Mamdi Venkata Lingum* (3) a distinction was made between a gift to a specified idol and a gift to God Almighty, and it was held that amongst Hindus a gift to God Almighty is not a gift to a living person and as such, does not fall under section 123 of the Transfer

(1) A I R 1920 All 227 (2) (a) *Manohar Ganesh Tembekar* v. *Lakhmiram Govindram* (1888) I L R 12 Bom 247 264 (b) *Thackersey Dewraj* v. *Hurbhum Nursey* (1884) I L R 8 Bom 132 (156)
(c) *Peranna Kumar Deb* v. *Golab Chand Baboo* (1874) L R 2 I A 145
(d) *Pramatha Nath Mullick* v. *Pradyumna Kumar Mullick* (1924 25) L R 52 I A 246 (3) (1933) I L R 56 Mad 687

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of Property Act and does not require to be made by a written document. Whatever may be said about the juristic personality of God as distinguished from an idol in Hindu Law, it may be stated that the same argument does not apply to the Mohammedan conception of God Almighty, who is believed to be capable of holding property and, no doubt, has an individuality of His own and certainly exists. We are therefore, of opinion that waqfs are gifts to God Almighty and are permissible to be made under the Oudh Estates Act, provided they do not contravene the provisions of section 12 of the Act, and provided further, that they are in the form mentioned in section 18 of the Act.

Section 12 prohibits a transfer of property to a person who is either not in existence at the time when the transfer takes effect, or is not in existence even at the death of a person who was in existence at that time. Waqf alal aulad is a transfer in which an interest in the usufruct of the property is created in favour of persons who were neither in existence at the time when the waqf commenced to operate, or at the time of the death of persons who were in existence at that time. It may be observed that the rule laid down in section 12 of the Oudh Estates Act is almost in the same terms as section 14 of the Transfer of Property Act. To section 14 of the Transfer of Property Act there is an exception which is contained in section 18 of the Act which makes such transfers valid provided they are for religious or charitable purposes. In the Oudh Estates Act there is no provision corresponding to section 18 of the Transfer of Property Act (the effect of section 18 of the Oudh Estates Act will be considered hereafter).

It was argued that as even a waqf alal aulad is a transfer to God Almighty and not to the beneficiaries, there is no creation of estates as contemplated by section 12, and as such section 12 does not prohibit

the creation of a waqf alal aulad. The contention is not sound. Though the corpus of the waqf property is transferred to God Almighty, yet its usufruct is transferred to unborn descendants of the waqif generation after generation. The usufruct, therefore, is dealt with in such waqfs contrary to the provisions of section 12. Again it was urged that section 12 contemplates the transfer of an estate and not of its usufruct. It was pointed out that section 11 speaks of an estate and not of its usufruct and therefore, section 12 cannot apply to the transfer of an usufruct of the estate. The argument is fallacious. Section 11 clearly mentions not the estate but also "any right or interest therein". Section 12 will therefore apply not only to the estates but also to rights or interests in such estates. The transfer of the usufruct of an estate is a transfer of a right or an interest in such an estate. Indeed, an estate without its usufruct is an empty thing. The core of an estate is its usufruct.

The next point to be considered is whether section 18 of the Act empowers a taluqdar to make a waqf alal aulad in violation of the provisions of section 12. Section 18 enacts that the giving of property by a taluqdar to religious or charitable purposes must be by means of an instrument of gift. The significance of this requirement can be understood only when we bear in mind the various modes in which such transactions can be made under the ordinary law. The alienation of property for religious and charitable purposes may be made in three different ways, namely by means of (1) an act of dedication, (2) an instrument of gift or (3) an instrument of trust.

A dedication of property for religious or charitable purposes is a divesting of ownership of property and vesting it in the public at large. This can be done under Hindu Law by an unequivocal act of declaration

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specifying (*a*) the property in respect of which the endowment is created (*b*) the object or purpose of dedication, and (*c*) renunciation by the founder of all beneficial interests in the property No writing is necessary for the purpose *Ganga Reddi* v *Tami Reddi* (1) nor is it necessary that there should be any person to whom the possession of the property dedicated is to be handed over The founder or his heir becomes in law the manager of the endowment (2) The giving of property for the above purposes may next take the form of a gift by the donor to a donee and there must be some person to accept the gift on behalf of the donee If it is by document the Registration Act will apply and a document dealing with property of the value of Rs 100 or more will have to be registered Strictly speaking, the provisions of the Transfer of Property Act will also apply to it and so the gift cannot be made of property of this value otherwise than by means of a registered instrument Lastly, the giving may be effected through the instrumentality of a trust, in which case it can only be done by means of deed of trust in writing and registered and there must be a trustee Section 18 of the Oudh Estates Act requires that the giving of property for religious or charitable purposes must be in the form of a gift by means of a registered instrument signed by the donor and attested by witnesses Thus a Muslim waqf in order to be valid must be in the form of a gift as required by the section If it is to be in the form of a gift it must be governed by section 11 and 12 There is no reason to think that the word gift mentioned in section 18 is something different from the same word used in section 11 Section 18 does not confer a right to make a gift for religious or charitable purposes It merely provides

(1) (1925 27) L R 54 I A 186 (2) Mukerji's Law of Religious and Charitable Endowments p 168

the mode of making a gift. The right to make a gift for religious and charitable purposes is to be found elsewhere that is to say, in section 11. In our opinion, a gift for religious and charitable purposes contemplated in section 18 is a gift covered by section 11 and therefore covered by section 12. Section 18 cannot be considered to be an exception to section 12 and all gifts for religious or charitable purposes must conform to the provisions of section 12.

We are therefore of opinion that the waqf deed in the present case is invalid because it contravenes the provisions of section 12 of the Oudh Estates Act.

The next point to be considered is whether the waqf is to be set aside as a whole or whether it can be held valid in so far as it reserves a benefit for the waqif and his sons who were in existence on the date of the execution of the waqf. Where an object of a charitable trust is invalid or otherwise fails, the charity can be applied for other charitable objects provided, however, a general charitable intent clearly appears from the terms of the trust. This is what is meant by the *cy pres* doctrine. It is by applying this doctrine that a deed for charity implicitly is held valid and executed by the Court, and where the testator defines his charity, but the object turns out to be impracticable or insufficient to consume the whole fund, the doctrine operates to enable the Court to apply the whole fund or the surplus to another charity as near as possible to the testator's intention (1). The doctrine is based on the view that the testator's general charitable intention should be given effect to as nearly as may be practicable. Where the main object of the waqif in making the waqf turns out to be invalid, the question whether the waqf property can be applied to other religious and

(1) Modern Equity by Dr. Hanbury, Edn. 4, p. 168.

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charitable purposes is to be determined with reference to the intention of the testator. The dominant intention of the waqif in creating the waqf in question was clearly to tie up the property for the benefit of the testator himself, and his descendants and relations. He even made a provision for the entire income of the property to be spent by himself during his life time in whatever manner he considered proper. His descendants who were mutawallis were given an absolute right to spend whatever was to be saved from the income of the property after defraying the expenses mentioned in the deed. The expenses mentioned in the deed consisted of two kinds: first, for the benefit of certain relations and descendants of the waqif himself and second for the benefit of the poor Muslim students and for other charitable purposes. The total amount which was to be spent on the poor and other charitable objects amounted to about Rs. 1,000 per annum, a very insignificant amount compared to the total income of the waqf property which was over Rs. 58,000 per annum. The waqif provided that the dignity and the status of his family was to be maintained by the mutawallis and further, that the executant in his life time and the future mutawallis were to be members of the British Indian Association and that they shall be entitled to the dignity and office of taluqdars. He further provided that after the waqif, the mutawalli of the waqf shall be in possession and enjoyment of all movable property and all the articles of show and decoration and out of them it shall be the duty of the mutawalli of the waqf to replace those articles which might become unserviceable and each mutawalli shall leave them for his successor after him. The waqif did not express a general charitable intent in favour of the poor or other charitable objects for the benefit of the public generally so long as any of his descendants was alive. In these cir

cumstances it would be violating the intentions of the waqif to turn the waqf from a waqf alal aulad into a public waqf by applying the income of the waqf property to public and charitable purposes The waqf must, therefore be held to be invalid as a whole

But though a waqf fails as a waqf the directions contained in it for the payment of maintenance allowance and right of residence in favour of persons who were alive at the date of the death of Asghar Ali and for the expenses to be incurred in respect of charities can be held to be binding on the plaintiff as being the last will and testament of Asghar Ali The plaintiff s claim will therefore, be subject to those directions These allowances and charities will be a charge on the property in the hands of the plaintiff

Mr *Niamatullah*, learned counsel for the appellant stated that in view of the fact that the evidence regarding the value of the movable property left by Thakur Asghar Ali was not clear and sufficient on the record, he did not press his appeal so far as it concerned the recovery of the movable property

The result therefore is that we decree the plaintiff s suit for possession over the properties which were included in the deed of waqf as also over the properties which belonged to Asghar Ali at the time of his death namely, the properties specified in Schedule A and items 2 to 6 of Schedule B of the plaint The allowances in favour of the persons alive at the death of Asghar Ali and the charities mentioned in the deed of waqf shall be a charge on the property mentioned in the deed of waqf The plaintiff will also be entitled to the mesne profits of the landed property in respect of which the suit is decreed from the heirs of defendant no 1 for the period beginning from 1st of March 1937 to 31st of October 1949 on which date defendant no 1 died

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The plaintiff will also be entitled to the profits of the property after that date up to the date of delivery of possession. If in the meantime any property has been taken over by the Government in view of the Zamindari Abolition and Land Reforms Act, the plaintiff will be entitled to compensation as and when made payable. As the property was taken possession of by the Deputy Commissioner of Bahraich on 1st of November, 1949 the profits in the hands of the Deputy Commissioner will be receivable by the plaintiff. The Court below will calculate the mesne profits recoverable from the heirs of defendant no. 1 after giving credit to any moneys which may have been paid by defendant no. 1 to such of the persons mentioned in the deed of waqf who were alive on the date of the death of Asghar Ali and for any amounts spent on charities mentioned in the deed of waqf. The decree for money that may be passed by the courts below will be against the assets of defendant no. 1 in the hands of his heirs. The court below will take the findings already recorded by the learned Civil Judge in respect of mesne profits as far as they go as correct. The rest of the plaintiff's claim is dismissed. The plaintiff will receive two thirds of his costs of both the courts from defendant no. 1's heirs. The defendants will bear their own costs throughout. These costs will also be recoverable from the assets of defendant no. 1 in the hands of his heirs. The record of the case shall be sent back to the lower court for determining the amount of mesne profits and for passing a final decree in respect thereof.

The cross objection is dismissed.

Appeal allowed.

FULL BENCH (APPELLATE CIVIL)

Before the Honourable B Malik, Chief Justice, Mr Justice Desai and Mr Justice Mukerji

BHAGIRATHI AND OTHERS

v

STATE THROUGH RAZIYA

1964
October 12

United Provinces Panchayat Raj Act, 1947 *s* 49(2) *rule* 84 *(b)—Constitution of India Art* 226 227—*Panchayati Adalat, if bound by provisions of Criminal Procedure Code —Provisions of s* 49(2) *whether, go to the root of jurisdiction—Power of superintendence under Art* 227

The provisions of the Panchayat Raj Act do not make it illegal for a Panchayati Adalat which is not bound by the provisions of Criminal Procedure Code to record conviction without specifying the offence or to inflict one sentence for a number of offences

Held (per C J and MUKERJI J DESAI, J *contra)* The provisions of s 49(2) of the Panchayat Raj Act do not go to the root of the jurisdiction of the bench and if no objection has been taken to the constitution of such a bench by either party in accordance with the provisions of r 84(*b*) it is not open to them to raise that point in a writ petition under Art 226 or 227 of the Constitution

(*Per* C J and MUKERJI, J) Though Art 227 can be said to be not merely administrative superintendence the power of superintendence conferred by Art 227 is to be exercised most sparingly and only in appropriate cases in order to keep the subordinate courts within the bounds of their authority and not for correcting mere errors

Where in a bench consisting of five panches to try a case under the Panchayat Raj Act only one panch belonged to village Hajiganj in which the applicants and opposite parties both resided and the rest belonged to other villages

Per DESAI J) *Held*, that the bench was illegally constituted and had no jurisdiction to try the case and that the defect in the jurisdiction could not be and was not waived by the applicants

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Held, further that the existence of a remedy through an appropriate writ bars an aggrieved party's invoking powers of superintendence of the High Court under Art 227 of the Constitution The superintending jurisdiction exists to correct only such errors as can be corrected through a writ of *certiorari* etc and that the superintending jurisdiction is exercised through the issue of one of such writs

Case law discussed

Criminal Miscellaneous No 1974 of 1951

The facts appear in the judgment

G P Bhargava, for the applicants

H N Seth, for the opposite parties

MALIK, C J —I have had the benefit of reading the judgment of my brother DESAI I agree with him that the Panchayati Adalat is not bound by the provisions of the Code of Criminal Procedure, and if for the three offences it did not pass separate sentences, it cannot be said that the sentence is illegal, provided the sentence passed by it is within its competence

As regards the second contention that the bench was not constituted in accordance with the provisions of section 49(2) of the Panchayat Raj Act, two points were raised before us firstly, that the decision was given by as many as seven panches and secondly that there was only one panch from village Hajiganj to which the complainant and the accused belonged while there should have been two

As regards the first point, we gave the appellant an opportunity to establish that the bench consisted of more than five panches or that more than five panches had taken part in the proceedings or pronounced the judgment Learned counsel admitted that he had no instructions on the point and was not able to substantiate the same The affidavit in support of the allegation has not been properly sworn and cannot therefore be relied upon

Coming to the second point sub section (2) of section 49 of the United Provinces Panchayat Raj Act (No XXVI of 1947) is as follows —

> Every such bench shall include one panch who resides in the area of the gaon sabha in which the plaintiff of a suit or proceeding or the complainant of a case resides and likewise one panch residing in the area of the gaon sabha in which the defendant or the accused resides and three panches residing in the area of the gaon sabha in which neither party resides

The sub section clearly provides for a case where the complainant is a resident within the area of one gaon sabha and the accused is a resident within the area of another gaon sabha and in such a case one panch is to be from the area of the gaon sabha of the complainant and one from the area of the gaon sabha of the accused and three panches were to be from the area of the gaon sabha in which neither party resides The legislature does not seem to have made any provision for a case where both the complainant as also the accused come from the same area of the gaon sabha

The other point to be borne in mind is that in a case there may be more than one complainant and more than one accused who may all be residents of areas under different gaon sabhas —In such a case it will be difficult to appoint a bench in accordance with the provisions of sub section (2) of section 49

The third important factor to be borne in mind is that the quorum is of three panches and none of the three panches taking part in the trial and forming the quorum may be from the area of the gaon sabha of the accused or the complainant

Under sub-section (2) of section 49 it will be possible only in a limited number of cases for the sarpanch to

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constitute a bench It was suggested that whenever the sarpanch finds any such difficulty, he can always refer the matter to the prescribed authority which, in such a case will not be bound by the provisions of sub section (2) of section 49 in making the nomination

Sub section (4) of section 49 provides that—

> Notwithstanding anything contained in this section, the State Government may by rules prescribe the constitution of special benches for determining any dispute arising between any parties or gaon sabhas of different circles or for any other purpose

Rules 84(*a*) and (*b*) are the rules framed in this connection Rule 84(*b*) is as follows

> If in a suit, case or proceeding, the sarpanch of a Panchayati Adalat or his near relation, employer and employee or partner in the business of his, is a party or in which any of them may be personally interested or the sarpanch finds any difficulty to form a bench according to section 49 of the Act the sarpanch instead of forming a bench under the said section, shall immediately after the institution of the suit, case or proceeding as the case may be, submit the papers to the prescribed authority who shall constitute a bench for its trial, under section 49(2) or sub rule (*a*) of this rule as the case may be

This provision does not appear to me to be helpful as it refers us back to sub section (2) of section 49 of the Panchayat Raj Act and the bench has to be constituted in accordance with the provisions of that sub section Sub rule (*a*) of Rule 84 is as follows

> '(1) *Constitution of a special bench*—
>
> For the purpose of trial or decision of any suit, case or proceeding, parties of which are

residents of different circles or different districts or are residents of places governed by the Act, the prescribed authority having jurisdiction over the Panchayati Adalat in which a suit or case or proceeding is instituted or transferred for disposal shall constitute a special bench consisting of panches of the said Panchayati Adalat and if convenient and possible, may include a panch of the other circle and shall appoint one of them as chairman of the bench unless the sarpanch is a member of it. The bench shall hold its sittings at a place to be fixed by the prescribed authority and procedure shall, in other respects be governed by rule framed for the guidance of the Adalat.

(2) The sarpanch shall prepare a list of names of all the panches in alphabetical order and constitute a bench of five panches serially turn by turn from it for the trial of the case, suit or proceeding.

Provided that the sarpanch shall exclude from a bench, after recording his reasons in writing any panch if he does not fulfil the provisions of section 49 or rule made in that behalf or if any party has any reasonable objection against him.

Provided further that so far as possible the bench shall be constituted in the presence of both the parties and the statement to the effect that they have no grievances against the panches of the bench shall be taken in writing."

Clause (1) of sub rule (a) of Rule 84 gives the power for constitution of a special bench where the parties are residents—

(i) of different circles or

(ii) of different districts or

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(iii) of places governed by the Act

and read as a whole it seems to me to apply to a case where the dispute is between parties living not within the jurisdiction of the same sarpanch and not to a case where merely by reason of the fact that there are more than one accused or more than one complainant living in areas—in the same circle—under different gaon sabhas that the difficulty has arisen

Sub rule (*d*) of Rule 84 gives a party a right to object to the sarpanch regarding the personnel of a bench The sarpanch has to decide the objection and his decision is liable to correction in revision by the appellate prescribed authority

After careful consideration, brother AGARWALA and I took the view in *Moharsingh* v *State* (1) that the provisions of section 49(2) of the United Provinces Panchayat Raj Act do not go to the root of the jurisdiction of the bench and that if no objection has been taken to the constitution of such a bench by either party in accordance with the provisions of Rule 84(*b*) it is not open to them to raise that point in a writ petition under Article 226 or 227 of the Constitution

As regards the objection that the application was filed under Article 227 and not under Article 226 of the Constitution, if I were of the opinion that the Panchayati Adalat had not been properly constituted and had, therefore no jurisdiction to convict the accused it may have been possible to interfere even though proper relief may not have been asked In this connection I may refer to the recent decision of the Supreme Court in *Waryam Singh* v *Amarnath* (2) where their Lordships pointed out that Article 227 restored to the High Courts power of judicial superintendence which they had under section 15 of the High Courts Act 1861 and

(1) 1953 A L J 265 (2) A I R 1954 S C 215

section 107 of the Government of India Act Such power their Lordships pointed out had to be exercised most sparingly and only in appropriate cases in order to keep the subordinate courts within the bounds of their authority and not for correcting mere errors In this connection I may refer to the judgment of my brother SAPRU, J in *Motilal v State through Srimati Sagarwati* (1) where he pointed out that Articles 226 and 227 must be so interpreted that they do not overlap and that while Article 226 concedes to this Court vast powers of what might be called judicial review or control by the issue of writs, directions or orders the main objection of Article 227 would, more broadly seem to be to secure administrative supervision not easily exercisable by writs directions or orders over all courts or tribunals (excepting Army tribunals) within its jurisdiction And further he said Articles 226 and 227 are thus supplementary to each other The emphasis under article 227 is on administrative control and the limited judicial powers contemplated by it are intended for and merely ancillary to such administrative control Thus Articles 226 and 227 are not intended as far as I can see for identical situations Though therefore Articles 226 and 227 are not intended, as far as I can see for identical situations Though therefore Article 227 can be said to be as has been pointed out by their Lordships of the Supreme Court not merely administrative superintendence the power of superintendence conferred by Article 227 must be exercised most sparingly and only in appropriate cases in order to keep the subordinate courts within the bounds of their authority and not for correcting mere errors

I agree that this application must be dismissed

MUKERJI, J —I agree and have nothing to add

DESAI, J —This is an application under Article 227 of the Constitution for setting aside conviction of the

(1) I L R [1952] 1 All 858

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applicants by a panchayati adalat under sections 323, 504 and 506, Indian Penal Code. The applicants were prosecuted by the opposite party before the panchayati adalat for the three offences mentioned above. The sarpanch constituted a bench consisting of five panches to try the case. The applicants are residents of village Hajiganj and the opposite party also is a resident of the same village. Out of the five panches, only one panch, namely Sri Mewa Lal, belonged to village Hajiganj and the rest belonged to other villages. The bench passed upon the applicants one sentence of fine to cover all the three offences of which they have been found guilty. They challenged their conviction through an application under section 85 of the Panchayati Raj Act presented before the Sub divisional Magistrate. It is not known what were the grounds taken by them in their application but the grounds that were pressed orally before the learned Sub divisional Magistrate were (1) that the conviction for the offences of sections 504 and 506 was illegal when they were convicted unuder section 323 Indian Penal Code, and (2) that if the opposite party had been attacked by all of them with lathis she would not have escaped with only bruises. The learned Sub divisional Magistrate not seeing any force in these grounds and not being satisfied that there had resulted any miscarriage of justice dismissed their application. Thereupon they filed the present application. It is stated in the application that it was illegal for the Panchayati Adalat to pass one sentence for all the three offences and that the bench was not constituted in accordance with the provisions of section 49(2) of the Panchayat Raj Act as it included only one panch from village Hajiganj instead of two. The case came up for hearing before our brother Raghubar Dayal who was of the opinion that *Bay*

Nandan v *E* (1), required reconsideration and that the questions that arise in the present case arose in Misc 2126 of 1951 which he had referred for decision to a larger Bench, and accordingly he referred this case also to a larger bench

The facts in *Brij Nandan* v *Emperor* (1), were that five men were prosecuted under sections 147, 452 and 323 read with section 149, Indian Penal Code and were convicted by a magistrate who did not specify the sections under which he convicted them, and passed a sentence of six months imprisonment and a fine of Rs 50 Our brother HARISH CHANDRA held that the conviction and the sentence were illegal because the magistrate ought to have specified the offences of which he convicted the applicants and ought to have given separate sentences for the different offences He referred to sections 367 and 537 of the Code of Criminal Procedure but the provisions of the Code of Criminal Procedure do not govern proceedings before a panchayati adalat A panchayati adalat is not at all bound by its provisions and its orders cannot be held to be illegal on the ground of any conflict with them It might have been illegal under the Code to convict without specifying the sections or to pass one sentence for a number of offences but it does not follow that it would be illegal for a panchayati adalat also to record a conviction without specifying the offences and to pass one sentence for all of them Whether it is illegal or not would depend upon the provisions of the Panchayat Raj Act alone None of its provisions makes it illegal for a panchayati adalat to record conviction without specifying the offences or to inflict one sentence for a number of offences The powers conferred upon

(1) 1947 A L J 593

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a panchayati adalat are so wide that nothing that it does is illegal if it does not contravene any specific provision of the Panchayat Raj Act. Therefore it was not illegal for the panchayati adalat to pass one sentence upon the applicants without specifying the offences and it is not necessary for us to reconsider *Brij Nandan* v. *E.*

Section 49(2) of the Panchayat Raj Act undoubtedly requires a bench to consist of one panch residing in a gaon sabha in which the complainant resides, one panch residing in a gaon sabha in which the accused resides and three panches residing in gaon sabhas in which neither party resides. According to it a bench must consist of exactly five panches. It follows that if both the parties reside in the area of one gaon sabha, the bench must include two panches residing in that gaon sabha. If it includes only one, the remaining four would come from the areas of gaon sabhas in which neither party resides and that would be against the provisions of section 49(2). The opposite party is absent, but the State which is also impleaded as an opposite party has not denied the allegation of the applicants that the bench which tried them included only one panch from the Gaon Sabha of Hajganj and that the parties both reside in Hajganj. The bench was therefore constituted against the provisions of section 49(2).

In *Girja Prasad* v. *Zalim Singh* (2) it was held by our brother AGARWALA that section 49(2) does not require that if both the parties come from the same gaon sabha, there should be two panches from the gaon sabha. I respectfully differ. In my opinion the law in section 49(2) is clear and the above decision should be overruled. The question was discussed in *Mohar Singh* v. *The State* (3) by the learned Chief Justice who does not appear to have accepted the view of AGARWALA, J.

(1) 1947 A.L.J. 393 (2) 1953 A.L.J. 89
(3) 1953 A.L.J. 265

I now come to the question of the effect of non compliance with this particular provision of section 49(2) I am of the opinion that the non compliance causes a jurisdictional defect in the constitution of the bench and that the panches have no jurisdiction to try the case assigned to them The law insists upon there being exactly five panches in every bench and upon those panches coming from particular gaon sabhas If a bench must include a panch belonging to a particular gaon sabha but does not include him or includes more panches belonging to a gaon sabha than are required under section 49(2) the constitution of the whole bench becomes defective and the panches are devoid of any jurisdiction If a person has no right at all under the provision to be a member of the bench it means that he has no jurisdiction whatsoever to try the case In the present instance out of the four panches belonging to gaon sabhas other than of Hajiganj one was not qualified to be a member of the bench though it may not be known which one In all four of the panches were qualified to be members and the fifth on account of his disqualification should be treated as not a member The law requires a bench of not more than and not less than five panches Hence the bench being of only four members was not legally constituted and had no right to try the case In other words it had no jurisdiction over the subject matter of the case I may mention here that the provision that a bench must include five panches is not inconsistent with the provision contained in section 77A to the effect that if on any date a panch is absent on account of illness etc the remaining panches may go on with the case provided that at least three of them including the chairman are present One deals with the constitution of a bench and the other with presence of its members during the trial of a case What the two provisions considered

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together mean is that a bench must consist of five panches, that it is not essential for all of them to be present on every date of hearing and that if at least three panches, including the chairman, are present they can try the case The fact that three panches are allowed to try the case does not mean that there is no jurisdictional defect if a bench is constituted with only four or even three panches, or with five panches, one or more of whom possess no residential qualification to be members of it

The analogy of a High Court having a number of Judges, any number of whom can form a bench to try any case, does not apply to a panchayati adalat All Judges of a High Court are equally qualified to try any case, but all panches of a panchayati adalat are not equally qualified to try any case The creation of a Bench of any Judges of a High Court to try any case is not in contravention of any statutory or constitutional provision on the other hand the creation of a bench of five panches to try a case may contravene the provisions of section 49 The Constitution vests the power in the High Court and not in its divisions but the Panchayat Raj Act does not vest the power in the panchayati adalat and vests it only in a particular department or bench of it An offence is triable by a panchayati adalat but not by all or any of its panches it is triable only by particular five panches possessing certain qualifications and selected by the sarpanch in a particular order A list is prepared of all the panches a panchayati adalat in alphabetical order and the Sarpanch has to select five panches possessing the necessary residential qualifications serially turn by turn from it see Rule 84(2) of the Rules framed by Government under the Act Only the panches selected by the sarpanch can try a case no other panch can try it

If a court is not constituted in accordance with the law it has no jurisdiction to act as such In *Queen Empress* v *Ganga Ram* (1) a Full Bench of this Court was called upon to decide whether a Judge of this Court was appointed in accordance with the law and was competent to hear a case It held that he was legally appointed but observed, though by way of obiter at page 156, that if he were not legally appointed all his judgments, decrees and orders in civil and in criminal cases would have been *ultra vires* and illegal In the *Colonial Bank of Australasia* v *Willan* (2) the Judicial Committee explained what is meant by want of jurisdiction It pointed out that there must be certain conditions upon which the right of every tribunal of limited jurisdiction to exercise that jurisdiction depends and that they may be founded either on the character and constitution of the tribunal or upon the nature of the subject matter of the enquiry This supports the view that illegal constitution of a tribunal is a jurisdictional defect It is stated by Craies in his Interpretation of Statutes (1952) page 246 that when a statute confers jurisdiction upon a tribunal of limited authority and statutory origin the conditions and qualifications annexed to the grant must be strictly complied with A Judge, who is prohibited from sitting by the plain directions of the law, cannot sit and the consent that he shall sit gives no jurisdiction per PECKHAM, J, in *McClaughry* v *Deming* (3) If the quorum for a bench of Magistrates is fixed at three and only two Magistrates are present the bench is not legally constituted see *Queen Empress* v *Muthia* (4) The reason is as stated in *Textile Mills Securities Corporation* v *Commissioner of Revenue* (5) that a court consists of all the Judges appointed to it A rule made under the Bar Councils Act 1926 required that all the

(1) (1894) I L R 16 All 156 (2) (1873 74) L R 5 P C 417 [illegible]
(3) ( ) U S 46 L E 1049 (4) (1893) I L R 16 Mad 410
(5) 86 L E 249

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members of a tribunal must sign their findings *In re An Advocate, Madras* (1), a member of a tribunal died before the findings were written out and could be signed and it was held by a special bench of the Madras High Court that the tribunal ceased to be properly constituted on his death. The Supreme Court dealt with a similar defect in a tribunal established under the Industrial Disputes Act in the *United Commercial Bank Ltd. v. Their Workmen* (2). The tribunal was constituted with three members but one member ceased to be available to it and the Supreme Court decided that the remaining two members had no jurisdiction to function as tribunal. KANIA C. J. observed on page 237:

> In our opinion the position here clearly is that the responsibility to work and decide being the joint responsibility of all the three members if proceedings are conducted and discussions on several general issues took place in the presence of only two followed by an award made by three the question goes to the root of the jurisdiction of the Tribunal and is not a matter of irregularity in the conduct of those proceedings.

Maxwell writes in his Interpretation of Statutes 9th edition paragraph 371:

> 'An Act which empowered two or more Justices or other persons to do an act of a judicial, as distinguished from a ministerial nature impliedly required that they should all be personally present and acting together in its performance.'

Jurisdiction means the power to hear and determine the subject matter in controversy between parties to a suit to adjudicate or exercise any judicial power over

(1) A.I.R. 1942 Mad. 267. (2) A.I.R. 1951 S.C. 230.

them, *The State of Rhode Island* v *The Commonwealth of Masch* (1) *Sample* v *Hager* (2) *Binder up* v *Pathe Exchange* (3) MOODY, J., described it in *Fenner* v *Great and Northern Railway Co* (4) as the right to put the wheels of justice in motion and to proceed to the final determination of a cause upon the pleadings and evidence According to Corpus Juris Secundum Vol 22, Criminal Law, paragraph 107, jurisdiction as applied to criminal law means the power to enquire into the facts to apply the law and to declare the punishment for an offence in a regular course of juridicial proceeding or the right of administering justice through laws by the means which the law has provided for that purpose Therefore if a bench of a panchayati adalat is not constituted in accordance with the law and therefore cannot try the case to try which it is constituted it is devoid of jurisdiction over it whether the defect in the constitution arises out of there being not exactly five panches or out of there being five panches one or more of whom are not qualified to sit on the bench

It is elementary that there can be no waiver of want of jurisdiction If the jurisdiction of a court is a grant of authority to it by a legislature, it is beyond the scope of litigants to confer it Territorial jurisdiction stands on a different footing though defined by a legislation it relates to the convenience of litigants and as such is subject to their disposition A personal privilege respecting the venue or place of a suit may be waived or lost by failure to assert it reasonably see *Nerbo Co* v *Bethlehem Ship Building Corporation* (5) and *Industrial Addition Association* v *Commissioner of Internal Revenue* (6) In criminal matters parties cannot waive what the law directs see *Park Gate Iron & Co Ltd* v *Coates* (7) It is stated by Maxwell at page 892 that

(1) 9 L E 1233
(2) 68 L E 308
(3) 84 L E 167
(4) 18 L E 402
(5) 83 L E 667
(6) 89 L E 250
(7) (1869 70) L R 5 C P 634

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In criminal matters, a person cannot waive what the law requires and that any statutory objection which goes to the jurisdiction does not admit of waiver and at 391 that When public policy requires the observance of the provision, it cannot be waived by an individual *Privatorum conventio juri publico non derogat'* It was pointed out in *Patton* v *U S* (1), that one of the circumstances that gave rise to the ancient doctrine that an accused cannot waive anything was that he was not furnished counsel Under the Panchayat Raj Act also an accused is not allowed the assistance of counsel, therefore it would not be proper to hold that he waives a defect in jurisdiction on account of his failure to object to it in time An essential requisite of the doctrine of waiver is that the party knows of the irregularity If he does not know of it, he cannot be said to waive it Waiver is always a question of fact and there can be no waiver without knowledge as observed in *Pence* v *Langdon* (2) Though ignorance of law is no excuse, an accused in fact may not know that the bench constituted by the Sarpanch to try him is not constituted in accordance with the provisions of section 49 of the Panchayat Raj Act and if on account of his ignorance does not object to the Bench trying him, it cannot be said that he waives the defect A Full Bench of the Patna High Court observed in *Ramanuja Prasad Singh* v *Ram Kawal Upadhyaya* (3) that if a court has competence in respect of the person the place and the character of the case it may exercise jurisdiction that if by reason of any limitation imposed by statute, a court is without jurisdiction to entertain any particular action neither the acquiescence nor the express consent of the parties can confer jurisdiction upon the court and that a different question arises when it is suggested that a court in the exercise of the jurisdiction

(1) 74 L E 894 (2) 25 L E 420
(3) A I R 1949 Pat 199

which it possesses, has not acted according to the mode prescribed by the statute If such a question is raised, it relates obviously not to the existence of jurisdiction but to the exercise of it in an irregular or illegal manner and the maxim *consensus tollit errorem* applies Maxwell writes at page 390 that

> The regulations concerning the procedure and practice of civil courts may in the same way be waived by those for whose protection they were intended

Matters upon which the jurisdiction of the court depends since they do not refer to matters of procedure which are enacted for the benefit of the individual can not be waived see Crawford on Statutory Interpretation paragraph 272 W Bowsted writing in Encyclopaedia of the Laws of England Vol 14 under article Waiver says that a statutory provision which is introduced for general public purposes and not for the benefit of a particular person only cannot be waived The provision in section 49(2) that a bench must include one panch who resides in the area of the gaon sabha in which the complainant resides and one panch residing in the area of the gaon sabha in which the accused resides cannot be said to have been enacted for the purpose of any individual If a bench includes only one panch residing in the area of the gaon sabha in which both the parties reside it cannot be said that the provision that is infringed is one enacted for the benefit of any particular party only and that he can waive the irregularity The two panches have to be of one gaon sabha but not of opposite factions in the village and it cannot be said that the legislature contemplated that when there are two panches residing in the common gaon sabha one would side with or vote for the complainant or look after his interests and the other would

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side with or look after the interests of the accused. There is no assumption that the two panches would take opposite views of the case and balance each other. The law requires two panches from the common gaon sabha not with any such intention. They are as likely to be on one side as to be on opposite sides. Even if a bench includes only one panch from the gaon sabha and he has given his opinion in favour of the accused, the accused can plead that the bench was illegally constituted because there was no second panch from the common gaon sabha. He can raise this objection even if for all one knows the second panch from the common gaon sabha might have given his opinion against him. Section 49 was enacted with a view to reduce the discretion of the Sarpanch in the matter of constituting a bench as much as possible. It was only a fair provision that there should not be a preponderance of panches residing in a gaon sabha in which one of the parties resides otherwise there would be a danger of judgment being subordinated to local prejudice.

Coming to the cases decided under the Panchayat Raj Act, I find some conflict in them. One of the earliest cases decided is *Jiwa Ram* v. *Panchayati Adalat, Gurgena* (1). In that case an order was passed by only three panches and was on that very ground held to be "without jurisdiction" by our brothers SAPRU and AGARWALA. There was no defect in the constitution of the bench, it had five panches presumably of the required qualifications. Three of them passed the order in accordance with a rule framed by the State Government. The rule was held by our brothers to be *ultra vires*. The bench had jurisdiction and rightly proceeded to exercise it over the case, it was only in the course of the exercise of the jurisdiction that it committed the illegality. It

(1) I.L.R. [1958] 1 All. 927

is not known if any objection was raised to the order being passed by only three of the panches, probably it was not Still our brothers held that the order was void for want of jurisdiction A case in which the bench itself was not constituted in accordance with the law stands on a higher footing *Ram Prasad* v *State* (1) followed the decision in *Jwala Ram's case* In *Murai* v *Ganga Charan* (2) our brothers SAPRU and AGARWALA had to deal with a case in which the bench did not include a panch residing in the area of the gaon sabha in which the accused resided The defect was held to affect the jurisdiction of the bench and its order was quashed on that ground I notice that it was quashed in spite of the fact that the accused did not object to the constitution of the bench while the case was pending before the panchayati adalat They took the objection for the first time and that too not in very clear terms in their application to the Sub divisional Magistrate under section 85 of the Panchayat Raj Act If they could have waived the illegality in the constitution of the bench they could have done it only by not objecting to the illegality while the case was pending before the panchayati adalat Whatever they did subsequently could not possibly affect the question of waiver If they waived the illegality and could waive it, they could not have succeeded in the court of the Sub divisional Magistrate at all Under section 49(3) no panch can take part in any case to which he or any near relation is a party or in which he may be personally interested In *Moti Lal* v *State* (3) that provision was infringed and a panch who was personally interested in the case took part in trying it Our brothers SAPRU and AGARWALA set aside the order of the panchayati adalat on that ground Under Rule 84 of the Panchayat Act

(1) 1953 A L J 161 (2) 1952 A L J 98
(3) I L R [1952] 1 All 558

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Rules if it is not possible for a Sarpanch to constitute a bench in accordance with the provisions of section 49 a special bench is to be constituted by the Subdivisional Magistrate In *Maharaadhiraja Shri Kameshwar Singh of Darbhanga* v *Bhavat Koeri* (1) I quashed an order passed by an ordinary bench when a special bench ought to have been constituted as an order without jurisdiction In *Jodhye* v *The State* (2), our brother BEG set aside an order passed by a panchayat adalat consisting of five panches constituting a bench and the Sarpanch as the sixth member In *Harihar Tewari* v *State* a case again decided by our brother SAPRU and AGARWALA it was contended that the bench did not include two panches residing in the gaon sabha in which the parties resided SAPRU J, found that the contention was not substantiated AGARWALA J, held that even if there was only one panch from the common gaon sabha the illegality could be and was waived by the accused I respectfully differ from his opinion that the provisions in section 49(2) do not refer to the capacity of a panch for being a member of a bench and have therefore no effect upon his jurisdiction over the subject matter of the case This case marks a departure from the previous decisions If a panch does not possess the requisite residential qualification and can not be appointed to a bench, it necessarily means that he has no jurisdiction to try the case and that a bench of which he is a panch has likewise no jurisdiction to try the case The residential qualification is one on which depends the right of a panch to be a member of a particular bench Further, AGARWALA J observed at page 108 that the provision like the one under consideration which is intended solely for the benefit of one of the parties is not a provision which affects the

(1) 1952 A L J 734 (2) 1952 A L J 103

existence of jurisdiction, it merely affects its exercise and can be waived As I said previously the provision under consideration is not intended solely for the benefit of one party or the other The legislature did not intended that the panch residing in the area of the gaon sabha in which the complainant resides should support him and that the other panch should support the accused It would have been useless for the legislature to have two panches who would oppose each other, it would have been as good as not having either of them on the bench Really the provision is based upon public policy Moreover as the provision deals with the very constitution of a bench, it deals with the existence of jurisdiction of a bench and not with the exercise of jurisdiction When an illegality is committed by a court, it must have been committed by assuming jurisdiction over the case or later while exercising jurisdiction vested in it If a Bench illegally constituted tries a case it commits an illegality by the very act of assuming jurisdiction over it and not while exercising jurisdiction vested in it In other words, the illegality is a jurisdictional defect The illegality of constituting the Bench is committed by the Sarpanch the Bench is not responsible for it But it cannot derive jurisdiction from the Sarpanch if he acts against the law and cannot try the case just because the Sarpanch assigns the case to it If still it proceeds to try it it assumes jurisdiction not vested in it and this illegality cannot be waived by either party In *Gnja Prasad* v *Zalim Singh* (1), AGARWALA J held that section 49(2) does not contemplate a case in which both the parties reside in the area of one gaon sabha and that if they do it is enough if the bench includes one panch only residing in that area Section 49(

(1) 1958 A L J 69

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applies in all circumstances. It is not unusual or strange for both the parties to come from the area of one gaon sabha as a matter of fact in a majority of cases they would come from the area of one gaon sabha. Our brother did not consider how a sarpanch can comply with the requirement that a bench must have three panches, none of whom resides in the area of the gaon sabha in which either party resides if it has only one panch residing in the area of the gaon sabha in which the parties reside.—In an earlier case *Kuleshwar etc. v. The State* (1), our brother BRIJ MOHAN LALL had held that a bench which does not include two panches residing in the area of the common gaon sabha is improperly constituted, that decision is not referred to by AGARWALA J. In *Mohar Singh v. State* (2) it seems to have been accepted that the provision under consideration does require that a bench must include two panches residing in the area of the gaon sabha in which both the parties reside but an infringement of it was held not to go to the root of the jurisdiction of the bench. In my opinion that decision requires re-consideration in view of what I have said above. If there are more than one complainant residing in the area of more than one gaon sabha or more than one accused residing in the area of more than one gaon sabha all that the provision requires is that there must be one panch from each of the areas. The provision does not require that there must be panches residing in the areas of all gaon sabhas in which every complainant and every accused resides. Cases may arise in which the requirement that the remaining three panches must come from areas of the gaon sabhas in which neither party resides cannot be fulfilled, it may happen that there are several complainants or several accused and there is no gaon sabha, in the area of which one complainant or one accused does not reside. The legislature however has

(1) 1958 A. C. J. 189. (2) [1959] 1 All. E. R. 1[illegible]

provided for such a contingency by authorising the State Government to prescribe rules for the constitution of special benches Accordingly the State Government have made rule 84(3) to the effect that if a sarpanch finds any difficulty in forming a bench according to the provisions of section 49 he should submit the papers to the prescribed authority who will constitute a special bench The prescribed authority is empowered under rule 84(d) to constitute a bench either in accordance with the provisions of section 49(2) or in accordance with the provisions of rule 84(a) There are two different sets of circumstances in which a sarpanch may find it difficult to form a bench and is empowered to refer the matter to the prescribed authority - One is when he or any of his relations etc is a party and he feels embarrassed in forming a bench in such a case a bench can be formed in accordance with the provisions of section 49(2) and the prescribed authority must form a bench according to them The other set of circumstances is that the sarpanch cannot form a bench in accordance with the provisions of section 49(2) and in such a case the prescribed authority is required to form a special bench under rule 84 (a) When forming a special bench he is not guided by the provisions of section 49(2) at all this is evident from the fact that the matter is referred to him just because it is not possible to comply with those provisions I may also refer to rule 84(d) which allows a party to a case who is 'dissatisfied with the personnel of a bench constituted for its hearing to make an application to the sarpanch stating the grounds of his dissatisfaction and requesting for the reconstitution of the bench' and empowers the sarpanch to constitute a fresh bench if the party concerned proves to the satisfaction of the sarpanch that the inclusion of a particular panch or panches in the bench would be prejudicial to fair trial Under these provisions, a party can object to the constitution of a

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bench only when he is dissatisfied with its personnel and apprehends miscarriage of justice They do not permit him to object solely on the ground that the constitution is against the provisions of section 49(2) If a bench is constituted in contravention of those provisions it cannot be said that either party would be dissatisfied with the personnel or that the non compliance with the provisions would be prejudicial to fair trial Even if the bench is not constituted in accordance with those provisions it may do full justice in the case and its personnel may satisfy both the parties Because it satisfies both the parties its constitution is not justified and it cannot assume jurisdiction over the case There is no provision in the Act or in the Rules giving a right to a party to object to the constitution of a bench only on the ground that it is against the provisions of section 49(2) Therefore if a party fails to object to the constitution reasonably it cannot be said to have failed to have recourse to a remedy prescribed by the law and thereby to have been estopped from objecting to it in a subsequent proceeding

In the result I find that the bench which tried the applicants was illegally constituted and had no jurisdiction to try them and that the defect in the jurisdiction could not be and was not waived by the applicants The order of the panchayati adalat convicting them was void for want of jurisdiction and deserved to be set aside

A panchayati adalat is a court subordinate to a High Court and amenable to its powers of superintendence These powers include power to interfere with a judicial order though only on the ground that it is in excess of jurisdiction or passed without jurisdiction or involves refusal to exercise jurisdiction which vests in a subordinate court Prior to the enforcement of the Constitution, this High Court had no power to issue

writs of *certiorari, mandamus* and prohibition There was therefore no occasion then for considering whether the powers of superintendence should be exercised through such writs or might be exercised in some other manner Now the Court has the power to issue such writs and the question arises whether the powers of superintendence should be exercised through the issue of such writs or by passing a simple order cancelling or revising the order passed by the subordinate court or tribunal The Queen's Bench of England exercises its superintending jurisdiction over subordinate courts and tribunals through the issue of the writs of *certiorari mandamus* and prohibition see *Shiva Nathap* v *Joma Kashi Nath* (1) *Ryots of Garabandho* v *Zamindar of Porla Kimedi* (2) *Bombay State* v *Advani* (3) The Law of Extraordinary Legal Remedies by Ferris 1926 page 255 Short and Mellors Practice of the Crown Office 1890 page 19 *Ex parte Bradley* 7 *Hall* 361 (4) and Schwartz's Law and the Executive in Britain, 1949, page 156 Therefore the powers of superintendence conferred upon all High Courts by Article 227 of the Constitution should be exercised through any of the writs of *certiorari, mandamus* and prohibition and not otherwise If the remedy of *certiorari* etc is not open to a person aggrieved by an order of inferior court or tribunal it would mean that a High Court has no power to interfere with it, Article 227 does not confer any other power upon it and it cannot interfere with the order even though no *certiorari, mandamus* or prohibition can lie against it In *Waryam Singh* v *Amarnath* (5) the Supreme Court laid down that Article 227 confers not only administrative but also judicial superintendence over subordinate courts and tribunals In that case the Judicial Commissioner of Himachal Pradesh on an application under Articles 226 and 227

(1) (1888) I L R 7 Bom 341 (2) (1948) L R 70 I A 129
(3) 1950 S C R 621 630 631 (4) 19 L J J 211
(5) 1954 S C R 565

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both set aside an order of a Rent Controller on the ground that it was arbitrary and therefore without jurisdiction. Evidently the question whether the powers of superintendence are to be exercised only through an appropriate writ or can be exercised even when the remedy of a writ is not open to the aggrieved party or can be exercised without the issue of an appropriate writ did not arise before and was not decided by the Supreme Court. But the Supreme Court did not hold that even when a writ of *certiorari* etc. can be an aggrieved party can invoke the powers of superintendence of Article 227 and not those of Article 226. It seems to me that the existence of a remedy through an appropriate writ bars an aggrieved party's invoking powers of superintendence of the High Court under Article 227, this necessarily follows from the propositions, which are beyond controversy now that the superintending jurisdiction exists to correct only such errors as can be corrected through a writ of *certiorari* etc. and that the superintending jurisdiction is exercised through the issue of one of such writs. If a party is aggrieved by an order of a subordinate court or tribunal, against which he has no statutory remedy he must apply for an appropriate writ or he would have no remedy from a High Court. If under the superintending jurisdiction a High Court can issue an order or direction it can only be in co-operation with, or ancillary to a writ of *certiorari*, *mandamus* or prohibition. Only to this extent can a High Court in exercise of its superintending jurisdiction issue an order or direction which is not of the nature of a writ of *certiorari* etc. The order of the panchayati adalat was passed without jurisdiction and could be quashed by a writ of *certiorari* therefore the applicants remedy was to apply for a writ of *certiorari* and not under Article 227 of the Constitution. For this reason I would dismiss the application.

BY THE COURT—The application is dismissed. Having regard to the facts of the case we make no order about the costs.

Application dismissed.

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BHAGIRATHI v. STATE OF UTTAR PRADESH

FULL BENCH (CIVIL REVISION)

Before the Honourable B. Malik, Chief Justice, Mr. Justice Agarwala, Mr. Justice Bhargava, Mr. Justice Mukerji and Mr. Justice Chaturvedi

KALAPNATH SINGH AND ANOTHER (DEFENDANTS)

v.

SHYAMA NAND AND OTHERS (PLAINTIFFS)

1964 October 12

Code of Civil Procedure, 1908, *s. 149—Order XXXIII r. 1 and 7, Order XLVII r. 1—Application for permission to sue as pauper rejected—Oral or written prayer for time to pay court fees made before signing order on application in forma pauperis—Duty of court—Power to review its previous order.*

In an application for permission to sue as a pauper if before signing the order disallowing the prayer to sue *in forma pauperis* an application oral or written has been made to the court praying that time for payment of court fee be granted it is the duty of the court to pass a suitable order on that application before rejecting the application for permission to sue as a pauper. As a court can not exercise jurisdiction under s. 149 Civil Procedure Code and grant time after it has lost seisin of the case and the document is no longer before it.

A court has jurisdiction to correct its own error by reviewing its previous order rejecting the application and by adding thereto a suitable order dealing with the prayer contained in the application for time.

Case law discussed.

Civil Revision No. 363 of 1944, from an order of C. B. L. Mathur, Civil Judge of Banaras, dated the 19th November, 1943.

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KALAP NATH SINGH v. SHYAMA NAND

The facts appear in the judgment

K L Misra, S N Singh and *N R Sharma* for the applicants

Ambika Prasad Janki Prasad, S N Verma Rajeshwari Prasad and *M B Bhatnagar* for the opposite parties

The judgment of the Court was delivered by—

MALIK, C J —This case was referred to a Bench of five Judges by our brothers SANKAR SARAN and GURTU who were of the opinion that the decision of the Full Bench in *Chunna Mal v Bhagwant Kishore* (1) needed reconsideration In that case the point referred to the Full Bench for decision was as follows

> Whether after rejecting the application for permission to sue as a pauper can the court by a separate and subsequent order allow the applicant to pay the requisite court fee under section 149 Civil Procedure Code and treat the application as a plaint '

The facts given in that judgment are that the application for leave to sue *in forma pauperis* was rejected on 29th September, 1934 On 1st October, 1934 an application was made for review on the ground of discovery of some new material to prove that the applicant was a pauper This application was rejected but at the time of rejecting the application, time was granted to pay the court fee SULAIMAN, C J, BENNET and ALLSOP, JJ, all agreed that after the application for leave to sue *in forma pauperis* had been finally disposed of it was not possible for the court to grant time under section 149, as there was no document before the court to which section 149 of the Code could apply The learned Judges also considered the question, whether at the time of rejecting the pauper application

(1) I L R [1937] All 92

the court could grant time to pay the court fee SULAIMAN C J and BENNET, J were of the opinion that even while dismissing the pauper application the court could not by the same order grant time to pay the court fee Mr Justice ALLSOP took a different view

The second point on which the learned Judges had differed was again referred to a Full Bench and it came up before a Bench of which three of us were members, *Devendra Kumar v Mahant Raghuraj Bharti* (1) There was another case under Order 33 in which there was a difference of opinion between one of us and PEAREY LAL BHARGAVA J was of the opinion that on the death of the petitioner no rights survived and the application for leave to sue *in forma pauperis* could not be continued by the legal representatives of the deceased The other view was that if the legal representatives were themselves paupers they could claim in their own right to continue the application to sue *in forma pauperis* and in case it was held that they were paupers and that the application filed by their predecessor was a *bona fide* application the suit would be deemed to have been filed when the original petition was presented in court The case was again referred to a Full Bench which held that on the death of the petitioner his legal representatives could pay the court fees and continue the suit or if they were themselves paupers they could apply to continue the proceedings without payment of court fees and in that connection discussed the nature of an application for leave to sue *in forma pauperis* and agreed with the view expressed by ALLSOP, J in *Chunna Mal's* case *Mst Latifunnissa v Mst Khairunnissa* (2)

There can be no doubt that an order under section 149 of the Code can only be passed when there is a

(1) Civil Revision no 452 of 1949 decided on 3rd November 1954 (2) Civil Revision no 474 of 1946 decided on 22nd September 1954

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document still before the court and once the court has lost seisin of the case and there is no document before it it cannot grant time to pay the court fee under that section

Learned counsel for the opposite parties has urged that on the 13th of November 1943 at the time when the court was passing the order on the pauper application an oral request was made to the court to grant time and the court asked the applicant to make a written application, and the order of the 19th of November was therefore passed on an oral prayer made on the 13th of November while the court was still seized of the case But the application of the 13th of November, does not bear out that contention On the other hand, from the application it appears that it was filed not before the court but probably before the Munsarim No mention is made in the Order Sheet of the 13th of November that such an application was filed by the plaintiffs on that day The stamp was not punched or initialled by the court reader, as would have been done if it was filed in court but was punched and initialled by the Munsarim of the court and the application was put up before the court for the first time on the 19th of November when the court passed the following orders

> Time for payment of court fee is given till 22nd December

The application on which this order was passed reads as follows

> (1) That the court has been pleased to disallow the applicant's application for permission to sue as pauper
>
> (2) That under the circumstances it is necessary that the court be pleased to allow at least two months' time to deposit the requisite court fee

otherwise plaintiffs suit may involve question of limitation

It is, therefore, prayed that the court be pleased to allow at least two months time to deposit the court fee

No mention is made in this application that an oral request was made Almost a year afterwards when the learned Judge who had passed the order of the 18th of November had been transferred and the defendants had raised a plea of limitation an application along with an affidavit was filed that a request was made before the pauper application had been rejected but the court asked the petitioner to make a written application The application and the affidavit show that by this time the plaintiffs were fully aware of the difficulties that they had to face on account of the decision in *Chunna Mal's* case and an attempt was made as far as possible to bring it in line with that decision We are not satisfied that any request was made to the court on the 18th of November before the pauper application was finally disposed of to grant time

After the court has once lost seisin of the case and the document is no longer before it the court cannot exercise jurisdiction under section 149 of the Code and grant time We therefore hold that the lower court after having finally disposed of the pauper application on the 18th of November 1943, had no jurisdiction on the 19th of November 1943 to grant time to pay court fee under section 149 of the Civil Procedure Code

It often happens that pauper applications, which are contested take some time before final orders can be passed thereon and during this period sometimes limitation for filing the suit on payment of court fees expires If a *bona fide* application for leave to sue *in forma*

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pauperis has been filed merely because the petitioner has not been able to prove that he was a pauper on the date of the suit, his claim should not be allowed to get barred and he should be given a chance to pay the court fee and continue the proceedings. When therefore a court is not satisfied that the petitioner is a pauper but has no reason to think that the application was not a *bona fide* one it should before it has signed the order disallowing the prayer to be allowed to sue *in forma pauperis*, grant time for payment of court fees. If, before signing the order disallowing the prayer to sue *in forma pauperis* an application oral or written has been made to the court praying that time for payment of court fees be granted, it is the duty of the Court to pass a suitable order on that application as part of the order disallowing the prayer to sue *in forma pauperis*. If by mistake or oversight this has not been done the Court has jurisdiction to correct its own error by reviewing its previous order rejecting the application and by adding thereto a suitable order dealing with the prayer contained in the application for time. In the case before us, however no prayer was made and no order granting time was passed at the time when the petition was rejected on the 18th of November 1943 and we have already held that after the pauper application has been finally dismissed there is no jurisdiction in the court to grant time several days later, to pay the court fee.

This revision application is therefore, allowed. The order of the lower court granting time for payment of court fees is set aside. The parties shall bear their own costs of this revision.

Order accordingly.

FULL BENCH APPELLATE CIVIL

Before the Honourable B Malik, Chief Justice, Mr Justice Agarwala and Mr Justice Bhargava

SOBAN SINGH JANGPANGI AND OTHERS (PLAINTIFFS)

v

TIKENDRA BAHADUR PAL (DEFENDANT)

1964 November 2

Kumaun Land Tenure—*Pakka and kachcha khaikars—Kachcha khaikari village if convertible into a pakka khaikari village*

Mauza Bangpani patti Malla Askot is not a *pakka khaikari* village

A *pakka khaikari* village may in course of time become a *kachcha khaikar* village by reason of the *pakka khaikars* losing their *pakka khaikari* rights a *kachcha khaikar* can in no case become a *pakka khaikar* nor can a *kachcha khaikari* village be converted into a *pakka khaikari* village

Second Appeal No 2034 of 1947(from a decree of R F S Bavlis District Judge of Kumaun dated the 11th August 1947

The facts appear in the judgment

R C Ghatak, for the appellants

L M Pant, for the respondents

The judgment of the Court was delivered by—

MALIK C J —This is a plaintiffs appeal against a decree passed by the learned Additional Civil Judge of Almora dismissing the plaintiffs suit for a declaration that Mauza Bangpani, Patti Malla Askot, is a *pakka khaikari* village of the plaintiffs and that thay have been wrongly recorded as *kachcha khaikars* in the revenue papers during the settlement of 1940 41 by the mistake of the Settlement Officer '

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The facts, so far as they could be ascertained from the papers on the record are that there was a village Juma which was the Asal Mauza Jalupibli was the Lagga of this village and there were in it three Thoks, Bangpani Bans Bagai and Mori Bagai All this property had been given by the British Government to the Rajwaths of Askot as their zamindari

On 7th April, 1865 the Rajwaths of Askot executed a Tasallinama in favour of one Dhami the ancestor of the plaintiffs, to cultivate the irrigated land in Bangpani on the following terms

> As you reside within our *ilaqa*, and as regards bringing under cultivation the waste land along the bank of Gori Ganga, you should first bring under cultivation the *sera* (irrigated land) of Bangpani You should pay the revenue and *malikani* dues according to the rates prescribed in the recent settlement and remain there in the capacity of a *khaikar* Without raising any objection, you should supply us the zamindars of Taluqa Askot whether good or bad or rich, coolie godam, etc You should bring tenants from other *ilaqas* and cultivate that land i e Bangpani Bans Bagai and Mori Bagai You should not instigate the cultivators of our *ilaqa* Besides this, you should extend the cultivation from the upper side to the lower side You shall cultivate the land as mentioned by us You shall abide by the conditions laid down above If you go in any way against the abovementioned conditions and behave dishonestly in any way towards us you shall be dispossessed without raising any objection from the abovementioned land lying within Askot

In the Muntakhib of 1867 during Beckett's Settlement, Thok Bangpani was recorded as *wiran* but

there are some indications in it that at one time it was divided into plots In the Khasra of that year it was entered as *muddati waran*

On 12th August 1871 Dhanu applied for the reduction of the rent assessed which he claimed was excessive There is another Tasalimama of 1875 with respect to some other land by which Dhanu was given permission to cultivate it It is not disputed that the present plaintiffs are in possession of the entire cultivated area in village Bangpani and after Dhanu s death no claim to that area was laid by the Rajwarhs of Asko The entire cultivated land therefore continued to be in possession of Dhanu and after his death his legal heirs What exactly is the area of the land whether this Thok Bangpani has got any uncultivated or unmeasured land on these points we have no information It is also admitted that the Rajwarhs of Askot have no khudkasht land in this Thok

To summarise therefore the facts in favour of the plaintiffs are that

(1) they are in possession of the entire cultivated area in Thok Bangpani and the hissedars have no khudkahst land in that Thok, and

(2) the hissedars did not spend any money to cut down the forest and reclaim the land and all that was done by plaintiffs predecessor in interest

As against it however, we have the facts—

(1) that Thok Bangpani belonged to the Rajwarhs of Askot who were the *hissedars* and had once been brought under cultivation and divided into plots

(2) that it had become *waran* or *muddati warar*,

(3) that the *hissedars* had allowed plaintiffs predecessor in interest to bring the irrigated land into cultivation,

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(4) that there is no evidence to prove that the plaintiffs are in possession of anything more than the irrigated area which was given to them under the Tasallinama of 1865

(5) that under the Tasallinama of 1865, the rights given to Dhanu were tenancy rights and not proprietary rights, and

(6) that there is no evidence on the record to prove whether there is any common land or unmeasured land in Thok Bangpani, and if so to whom it belongs

The rights that the plaintiffs can, therefore, claim are traceable to the document of 1865 and as that document creates merely tenancy rights the plaintiffs cannot claim that they have got anything more than the right to cultivate the irrigated land which was given to them in 1865

Learned counsel for the appellants Sri Ghatak, has urged that if a *hissedar*, which word means in Kumaun and Garhwal a co sharer in the zamindari rights, has no khudkasht land in the village and the entire cultivated area is in he possession of the *khaikars*, they must be held to be *pakka khaikars*

On the other side it is urged by Sri Pant that *pakka khaikari* cannot be created by a grant or by a *hissedar* giving to the grantee the right to merely cultivate the irrigated land in a village Learned counsel has urged that *pakka khaikari* is a term used in Kumaun and Garhwal in a special sense and means the body of persons who brought waste land under cultivation by cutting down the forest and reclaiming the land for their own benefit and thus became in a sense the proprietors of the land which was more or less unclaimed property and were later deprived of their proprietary rights by the Indian Rulers or by the British Government ignoring

their claims and settling the land with others who became the overlords and the actual occupiers of the village were reduced to the position of a sort of under proprietors For all intents and purposes they were the owners of the village including the common land and the wasteland, their only liability being to pay the land revenue and a certain percentage as *malikana* dues to the *hissedar* The liability of the entire body was joint and several and, on the death of one without any legal heir, his land reverted to the other Pakka Khaikars of the village and did not revert to the *hissedar* The main difference therefore it is claimed is that while a *kacheha khaikar* is a tenant, a *pakka khaikar* is in a sense a proprietor

Learned counsel for the appellants has relied on the observations in Stowell s Manual of Land Tenures of the Kumaun Division 1954 Edition page 62, where dealing with the main classes of *khaikars* the learned author has said

> first class of Khaikars, therefore, consists of the old occupant cultivators in villages where the *hissedars* hold no khudkasht land all villages held entirely by *khaikars* belong to this class since no instance is on record of an entire village of *khaikars* having any other origin

It is urged by learned counsel that Stowell s book in the absence of anything to the contrary, is considered to be authoritative and, if the village is held entirely by *khaikars*, it must be deemed to be a *pakka khaikari* village Stress is laid on the observations of Mr Stowell that no instance is on record of an entire village of *khaikars* having any other origin

On the other hand, learned counsel for the respondent has referred us to a decision of Board of

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Revenue in *Mahendra Singh v. Dhanda* (1), where though the entire cultivated area was in possession of the *khaikars*, it was held that it did not follow therefrom that it was a *pakka khaikari* village and the decision of the Commissioner in the Settlement proceedings of 1941 was set aside.

Dealing with the main class of *khaikars* Stowell has divided them into two main groups, Pakka Khaikars and other *khaikars*. About *pakka khaikars* he says that they are those *khaikars* who represent original cultivating proprietors of the land and who were deprived of their independent right by grants or assignments of the proprietary right under native rule or were by fraud or force reduced to the status of *khaikars* by usurping *thokdari muafidari* or padhani in the early days of British rule. At page 95 of his book dealing with the unmeasured land the learned author has said:

> They (*pakka khaikars*) have right over unmeasured land gaon sanjati in their village to the same extent as the *hissedars* have in khudkasht villages. The *hissedar* has no right to cultivate unmeasured land in the village.

According to Stowell, therefore a *pakka khaikar* is a sort of ex proprietor and his right is in reality an under proprietary right.

The law in the Kumaun and Garhwal for a long number of years, administered through executive officers and whenever in a *pakka khaikari* village a *hissedar* had managed to get a foothold by acquiring some khudkasht land, they held that the village had lost its *pakka khaikari* status and had become a *kachcha khaikari*. Dealing with this Stowell has said:

> But of this class of *khaikars* (i.e. *pakka khaikars*) the only ones that have succeeded in preserving a

distinct existence with recognised status and rights superior to those of the inferior classes of *khaikars* are those whose villages remained in the cultivating possession of the *khaikars* alone the *hissedars* not having succeeded in obtaining khudkasht cultivating whose villages remained in the cultivating possession of the *khaikars* alone, the *hissedars* not in them have succeeded in obtaining khudkasht cultivating possession in them

Subsequently it was recognised that it was unjust to the rest of the body of *pakka khaikars* that, if by some means a *hissedar* had managed to secure a footing in the village through one of the *pakka khaikars*, the rights of the other *khaikars* should thus be affected In later years, therefore, it was held that if a *hissedar* had in any way effected an entry and got khudkasht possession, his having done so should not on principle affect the right of the remaining *khaikars* ' In such cases it was suggested, a further question as to when and under what circumstances a *hissedar* got possession of the khudkasht land should be considered and the *hissedar* so obtaining land should be placed on precisely the same footing as regards his rights and privileges as any other *khaikar* and that the land so cultivated should not be considered to be his khudkasht nor should it affect the under proprietary rights of the other *khaikars* [*See* the decision of Mr J R Reid Commissioner dated 9th January, 1889, in *Debi Dutt v Prem Singh* (1)] it has also been held and is now well settled that in a *pakka khaikari* village the *khaikars* alone have a right to arrange for the cultivation pasturage etc including the succession to land lapsing owing to the death heirless, of *khaikars* the breaking up of waste, etc while the *hissedars* have no right beyond the collection of revenue, cesses and padhanchari

From the mere fact therefore, that the whole of the cultivated area in Thok Bangpani is in the possession

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of the plaintiffs, it cannot be assumed that they were the original cultivating proprietors of the land who were deprived of their proprietary rights by reason of the grant of the zamindari to the Rajwarhs of Askot. The origin of the possession of the plaintiffs and their predecessor is known. It was in the year 1865 that Dhanu was given the right to cultivate the irrigated land in the village which was a *muddati wiran*. No rights were conferred on Dhanu to the uncultivated land in the village and it cannot be said that he was given any under proprietary rights under the Tasallimama of 1865.

Learned counsel for the appellants has placed great reliance on a decision of Mr. Stiffe Commissioner, in *Chait Ram* v. *Banuwa* (1). Mr. Stiffe in his judgment has dealt with the origin of *pakka khaikars* and says:

> there are only two ways in which these *pakka khaikari* villages have originated one in the case of grant made over the heads of the original cultivators in which case the *pakka khaikar* corresponds almost exactly to the under proprietor of Oudh.
>
> The second case seems to me to be illustrated in the village now in suit. I take it that in the old days the position was much like the position in the Tarai and Bhabar Estates at the present moment, Government looked for the most solvent and influential man in the neighbourhood, settled certain villages with him and encouraged him to acquire tenants. The *hissedar*, thus created, probably had several villages and already had his home in a settled village. He found tenants for the other villages and arranged with them or it was arranged for him by Government that they should pay him certain dues and cultivate and manage the village

(1) Selected Revenue Decisions of Kumaun by Garola p. 103

It was not herefore, the *hissedar* who risked his money or expended his labour on reclaiming waste land but it was the body of tenants

There is however nothing to support the view of Mr Stiffe According o Mr Stiffe if there was an absentee landlord who had no cultivatory land in the village and he had spent no money or labour in reclaiming the land clearing the forest and rehabilitating the village and had left it all to be done by tenants then such tenants would become *pakka khaikars,* but, as we have already said there does not seem to be any authority for the proposition that such persons who were brought on to the land as tenants became ex proprietors if that is what constitutes a *pakka khaikari* In the glossary of terms used in the hills at page VIII of the Manual, *khaikars* are divided into two classes

(1) An under proprietor whose rights as the original occupant cultivator have been usurped by or granted to some other person at some former period This is the *pakka khaikar*

(2) An occupancy tenant (who or whose predecessor never had any higher right) This is the *khachcha khaikar*

Though a *pakka khaikari* village may in course of time, become a *kachcha khaikari* village by reason of the *pakka khaikars* losing their *pakka khaikari* rights a *kachcha khaikar* can in no case become a *pakka khaikar* nor can a *kachcha khaikari* village be converted into a *pakka khaikari* village How other *khaikari* rights i e other than *pakka khaikari* rights can be acquired is dealt with at page 63 of Stowell s book the fourth clause of which is as follows

At settlement a tenant at will or other person may be recorded as a *khaikar* at the request of the *hissedar,* usually under some previous agreement

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between the parties it is common in fact for instruments purporting to confer *khaikari* rights to defer the entry of such rights till the date of the next settlement

This definition exactly meets the case of Dhanu in whose favour the Tasalimnama of 1865 was executed Sal Assi Settlement or Traill's Settlement, was in the year 1823 in which the boundaries of different villages were fixed but no measurements were made The proceedings of the Beckett's settlement concluded in the year 1872 and during those proceedings the khasra of 1867 and the *muntakhib* of 1867 were prepared to which reference has already been made The entries in the settlement papers about the *khaikari* rights conferred on Dhanu were under a previous agreement between the parties

Two other papers have been relied upon One is an entry of 1872 in which Dhanu was recorded as Ghar Padhan but this entry was scored out and therefore no inference can be drawn from it that Dhanu had correctly been recorded as such The other paper is of 1883 in which a list was prepared of villages in which the entire cultivated land was held by *khaikars* and in which *hissedars* had no khudkasht land Bangpani was included in it According to the decisions of the Commissioners then prevailing if there was a *hissedar* in a village it could not be a *pakka khaikari* village but where the history of the village was known and it was known how Dhanu and his descendants came to have possession of the cultivated area in the village it is not possible to hold that the mere inclusion in the list was any proof in favour of the plaintiffs that they were *pakka khaikars* The list gives only the facts as found on the spot and it does not say whether the villages given in the list were *pakka khaikari* villages or *kacheha khaikari* villages

Having considered this matter carefully from such material as is on the record we must hold that the

plaintiffs have failed to prove that they were *pakka khaikar* and that Thok Bungpani is a *pakka khaikari* village The suit was rightly dismissed by the lower court and this appeal must fail and is dismissed with costs

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NOBAT SINGH JANGPANGI v TIKENDRA BAHADUR PAL

Appeal dismissed

FULL BENCH (CIVIL MISCELLANEOUS)

Before the Honourable B Malik, Chief Justice, Mr Justice Agarwala and Mr Justice Bhargava

LACHHMI AND OTHERS (APPLICANTS)

v

SOMAROO AND OTHERS (OPPOSITE PARTIES)

United Provinces Panchayat Raj Act, 1947 *s 49 and Rules made under it—A panch already appointed by Sarpanch —No objection taken by parties against him—A new panch can be appointed in his place*

1954 November 3

There is no provision in the Panchayat Raj Act or its Rules for appointment of a new panch in place of a panch already appointed and to whose appointment no objection had been taken by parties

Civil Miscellaneous (Writ) No 92 of 1953

The facts appear in the judgment

Sirish Prasad, for the applicants

Jagannandan Lal, for the opposite parties

The judgment of the Court was delivered by—

MALIK, C J —This case was referred to a Full Bench by a learned Single Judge as, in his view, an important question of law arose for decision which was likely to arise in other cases

A complaint was filed by one Sumaroo against Roop Narain and his two sons, Lachhmi and Bhaggan under

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certain sections of the Indian Penal Code The Sarpanch constituted a Bench of five panches whose names were Parshotam Dass Chairman Raghunath Prasad, Misri Lal Harihar Prasad and Ram Lakhan During the course of the proceedings it appears that two of the panches Harihar Prasad and Ram Lakhan, were replaced by two new panches Bhagirathi and Ram Adhar Singh As regards Bhagirathi there is a paper on the file, paper No 21 from which it appears that a report was made by Parshotam Dass, Chairman and Misri Lal that Harihar Prasad was not in Banaras and that, therefore some difficulty was felt in getting the quorum On this report the Sarpanch passed an order that the only other panch available from the Gaon Sabha of one of the parties was Bhagirathi and therefore he was being appointed It was said by the learned counsel at the Bar that Ram Lakhan had fallen ill and he was replaced by Ram Adhar Singh The fact that Ram Lakhan was replaced by Ram Adhar Singh is mentioned in the supplementary affidavit and it is not denied in the counter affidavit filed on behalf of the complainant, but in what circumstances and on what date is not clear from the file

On the 3rd August 1952 the three panches originally appointed that is, Parshotam Dass, Raghunath Prasad and Misri Lal and the two new panches, Bhagirathi and Ram Adhar Singh delivered a judgment in the case Bhagirathi gave a dissenting judgment and the other four decided in favour of the complainant and convicted the accused and sentenced them to pay various amounts as fine There was a revision filed against that order in the court of the Sub Divisional Magistrate, 1st Class, Banaras, but the learned Magistrate dismissed the revision on the 26th of November, 1952

The only two points dealt with by him were, firstly, whether the charge was read out to the accused and,

if not whether any prejudice had been caused to the accused and secondly whether the Chairman was present on all the dates of hearing The Magistrate held that the charge had been read out to the accused and that there was no satisfactory evidence that the Sarpanch had not attended on all the dates of hear ng

The two points raised before the learned Magistrate were not taken before us The point raised in this Court is that once the panches have been nominated by the Sarpanch he cannot replace them by new panches

Section 49 of the U P Panchayat Raj Act (Act No XXVI of 1947) provides that after a case, suit or pro ceeding has been instituted the sarpanch has to form a Bench consisting of five panches in accordance with the provisions of that section The sarpanch in this case did constitute a bench of five panches in accordance with the provisions of section 49 Section 77 A pro vides that If any panch appointed to a bench consti tuted under section 49 for the trial of a case suit or proceeding is absent at any hearing the remaining panches may notwithstanding anything contained in this Act try the case suit or proceeding provided how ever that at least three panches including the chairman, are present and provided further that at least one of the panches present is able to record evidence and proceedings The mere absence therefore of a panch does not affect the proceedings and it is possible for three panches to continue the trial provided the Chair man and a panch who is literate enough to record the proceedings are available Rule 84 B framed under section 110 of the Act, provides that where there is a dis agreement among the panches constituting a bench and by reason thereof it is not possible for them to give a decision by the opinion of the majority the sarpanch may constitute another bench, but no panch, who was a member of the former bench can be appointed to

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Mohk C J

the new bench The only other rule that need be mentioned is rule 84 D which provides that if any party to a case suit or proceeding is dissatisfied with the personnel of the bench constituted for its hearing he has to immediately on receiving information about the constitution of the bench and before commencement of hearing of the case suit or proceeding make an application to the sarpanch stating the ground of his dissatisfaction and request for the reconstitution of the bench In such a case the sarpanch has the power to reconstitute the bench These are all the provisions contained in the Act in the Rules about constitution of benches by the sarpanch There appears to be no provision in the Act or the Rules for appointment of a new panch in place of a panch already appointed and to whose appointment no objection had been taken by the parties

Section 55 of the Act bars the jurisdiction of courts of law to hear a case which is cognizable by a Panchayati Adalat unless an order has been passed by a Sub Divisional Magistrate or Munsif under section 85 quashing the jurisdiction of the Panchayati Adalat Even in drafting section 85 of the Act it does not appear to have been kept in mind that there might arise a case where by reason of death, incapacity or other reasons it may not be possible for the Panchayati Adalat to function and give a decision in the case The relevant portion of the section is as follows

> If there has been a miscarriage of justice, or if there is an apprehension of miscarriage of justice in any case suit or proceeding, the Sub Divisional Magistrate may on the application of any party or on his own motion at any time in a pending case and within sixty days from the date of decree or order call for the record of the case from the Panchayati Adalat and may for reasons to be recorded in writing—

(a) cancel the jurisdiction of the Panchayati Adalat at any stage, or

(b) quash any decree or order passed by the Panchayati Adalat at any stage

The section empowers the Sub Divisional Magistrate to quash any decree or order in the interest of justice or to cancel the jurisdiction of the Panchayati Adalat when he apprehends a miscarriage of justice The case will then have to be tried in the ordinary courts of law It has been pointed out that in a case where say three out of the five panches are not available on account of death, incapacity or any other reason it will not be possible for the remaining two to form a quorum No doubt, such a situation can rarely arise but there should be a provision for the reconstitution of a bench One view may be that in such a case there is in fact no bench and the original position is restored and the sarpanch can nominate a new bench for the hearing of the case He may then re start in accordance with the provisions of section 49 and the case can be heard by the new bench constituted by him the previous bench having by reason of death of incapacity of its members come to an end To illustrate our point we may take a case where all the five panches nominated by the sarpanch die There is then no bench in existence and there is therefore no reason why the sarpanch should not again act under section 49 of the Act and constitute a fresh bench If the panches, capable of acting, are less than three the same result should follow and the sarpanch should have the power to constitute a new bench If however three panches are still available who can function, the sarpanch has no right to interfere and appoint new panches to replace the old ones or put in a new bench to replace the old bench

The act nowhere provides for the removal by the sarpanch of a validly nominated panch to a bench

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SOMARDO

Malik C.J.

except in a case coming within the provisions of Rule 84 D. To hold that the sarpanch has got full discretion to interfere with a bench and replace one panch by another at any time during the pendency of a case even after hearing has been commenced and a part of the evidence has been recorded would not only be against the rules of natural justice but might result in serious abuse of power. A Sarpanch may in that case at his sweet will and pleasure, and for reasons of his own that may not be always commendable replace one panch by another if that panch happens to be absent on account of ill health or on any other good ground even though the Act does not make it obligatory on every panch to be present at every sitting of the bench.

The Act makes it clear that the Panchayat Adalat was not bound by technical rules of procedure or evidence and we are therefore always reluctant to interfere with decisions of a Panchayati Adalat on technical grounds. It does not appear from the record of the Panchayati Adalat, nor it is suggested in though they have filed several affidavits, that any objection was taken to the nomination of Bhagirathi and Ram Adhar Singh by the sarpanch. There was Bench of three panches properly appointed who functioned throughout and who were parties to the judgment. It is no suggested that the two new panches bench of three panches properly appointed who function so that the other three panches might have given a decision different to the one that they gave on the 3rd of August 1952.

We have already said that there is no mention made in the judgment of the learned Sub Divisional Magistrate that the point was argued before him. In this connection we may refer to Rule 84 D which provided that if a party is dissatisfied with the personnel of a bench he has to make an objecton before the commencement of the hearing of the case immediately on

the receipt of the information If he does not do so he is not allowed to object later on after the proceedings have commenced In Criminal Miscellaneous No 1974 of 1951 decided on the 12th October 1954 it was held that the provisions of section 49 (2) of the U P Panchayati Raj do not go to root of the jurisdiction of the bench and that if no objection was taken to the constitution of bench it was not open to them to raise that point in a writ petition under Article 226 or 227 of the Constitution

We are therefore not prepared to interfere and dismiss this application but make no order as to costs

Application dismissed

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ACTS AND ORDINANCES

OF

UTTAR PRADESH

JULY—DECEMBER, 1954

UTTAR PRADESH ENCUMBERED ESTATES (AMENDMENT) ACT 1954*

†(U P ACT NO XIII OF 1954)

‡[*Authoritative English Text of the Uttar Pradesh Encumbered Estates (Sanshodhan) Adhiniyam* 1954]

AN

ACT

to amend the U P Encumbered Estates Act 1934 *for certain purposes* — U P Act XXV of 1934

WHEREAS it is expedient to amend the U P Encumbered Estates Act 1934 for the purposes hereinafter appearing — U P Act XXV of 1934

It is hereby enacted as follows

1 (1) This Act may be called the U P Encumbered Estates (Amendment) Act 1954 — Short title and commencement

(2) It shall come into force atonce

*For Statement of Objects and Reasons please *see* U P *Gazette Extraordinary* dated December 12 1953

‡Passed in Hindi by the Uttar Pradesh Legislative Assembly on February 15 1954 and by the Uttar Pradesh Legislative Council on March 30 1954

Received the assent of the President on July 25 1954 under Article 201 of the Constitution of India and was published in the Uttar Pradesh *Gazette Extraordinary* dated July 31 1954

†Published in the Uttar Pradesh *Gazette Extraordinary* dated July 31, 1954

Amendment of section 2 of U P Act XXV of 1934

2 In section 2 of the U P Encumbered Estates Act, 1934, (hereinafter called the Principal Act)—

(i) clause (*e*) shall be deleted

(ii) clauses (*h*) to (*m*) shall be deleted, and

(iii) after clause (*m*) the following shall be added as new clauses (*n*) and (*o*)—

(*n*) a reference to proprietary rights in land shall include a reference to compensation and rehabilitation grant payable under and in accordance with the U P Zamindari Abolition and Land Reforms Act 1950 and

U P Act I of 1951

(*o*) the expressions compensation and rehabilitation grant shall mean the compensation or, as the case may be the rehabilitation grant payable under the U P Zamindari Abolition and Land Reforms Act 1950 and includes in the case of compensation, interim compensation payable under section 29 of the said Act

U P Act I of 1951

Amendment of section 7 of U P Act XXV of 1934

3 In sub section (2) of section 7 of the Principal Act for the words in full under section 23 or section 24 or granted a mortgage under section 25 or passed orders under section 27 or section 28 the words under Chapter V shall be substituted.

Amendment of section 9 A of U P Act XXV of 1934

4 In section 9 A of the Principal Act—

(1) in sub section (4) between the words fail and cancel the words or that it is no longer necessary in consequence of the acquisition of estates under the U P Zamindari Abolition and Land Reforms Act 1950 to continue the appointment of a receiver shall be substituted and

(2) sub section (5) shall be deleted

Deletion of section 9 C of U P Act XXV of 1934

5 Section 9 C of the Principal Act shall be deleted

Amendment of section 9-D of U P Act XXV of 1934

6 In section 9 D of the Principal Act for the word figures and brackets (2) (4) and (5) the word figures and brackets (2) and (4) shall be substituted

Amendment of section 11 of U. P Act XXV of 1934

7 In the proviso to sub section (2) of section 11 of the Principal Act for the words such property is transferred to any person under the provisions of section 24 25 28 or 31 or a bond is issued by the Collector to a creditor under section 30 to 31 the words the debt has been liquidated under Chapter V shall be substituted

Amendment of section 14 of U P Act XXV of 1934

8 For sub section (7) of section 14 of the Principal Act the following shall be substituted as sub sections (7) and (8)

" (7) If the Special Judge finds that—

(*a*) no amount is due, he may pass a decree for costs in favour of the landlord,

(*b*) an amount is due to the claimant he shall—

(i) pass a simple money decree having regard also to the provisions of section 8 of the U P Zamindars Debt Reduction Act 1952 for such amount together with any costs which he may allow in respect of the proceedings in his court and of proceedings in any court stayed under the provisions of this Act together with *pendentelite* and future interest at a rate not higher than 4½ per cent per annum and

U P Act XV of 1952

(ii) also certify the amount if any of such decree which in accordance with the provisions of section 8 of the U P Zamindars Debt Reduction Act 1952 is not legally recoverable otherwise than out of the compensation and rehabilitation grant payable to the landlord

Provided that no *pendentelite* interest shall be allowed in the case of any debt where the creditor was in possession of any portion of the debtor's property in lieu of interest payable on such debt for the period he was so in possession

(8) Every decree passed under sub section (7) shall be deemed to be a decree of a court of competent jurisdiction but shall not be executable within U P except under the provisions of this Act

Amendment of section 15 of U P Act XXV of 1934

9 In section 15 of the Principal Act after the words and figures section 14 the words 'or section 4 of the U P Zamindars Debt Reduction Act 1952 shall be inserted

Amendment of section 16 of U P Act XXV of 1934

10 In section 16 of the Principal Act after class (3) the following shall be added as a new class (3 A)—

Class (3 A)—Secured debts which are not legally recoverable otherwise than out of the compensation and rehabilitation grant payable to the landlord

Amendment of section 18 of U P Act XXV of 1934.

11 In section 18 of the Principal Act the following shall be added as a proviso—

'Provided that secured debts which in accordance with the provisions of section 8 of the U P Zamindars Debt Reduction Act 1952 are not legally recoverable otherwise than out of the compensation and rehabilitation grant payable to the landlord shall be recoverable from the compensation and rehabilitation grant aforesaid as though the security had not been extinguished

U P Act XXV of 1952

Amendment of section 19 of U P Act XXV of 1934.

12 For sub section (2) of section 19 of the Principal Act the following shall be substituted

'(2) The Special Judge shall inform the Collector—

(*a*) of the amount of the secured debt which is not legally recoverable otherwise than out of the compensation and rehabilitation grant payable to the landlord in respect of the mortgaged estate, and

(b) of the nature and extent of the property mentioned in the notice under section 11 which he has found to be liable to attachment or sale in satisfaction of the debts of the applicant

Insertion of a new section 19-A in U P Act XXV of 1934.

13 After section 19 of the Principal Act the following shall be added as a new section 19 A

Amendment of decrees transmitted to the Collector

19 A Where a decree has been passed by the Special Judge before the commencement of the U P Encumbered Estates (Amendment) Act 1954 and the decree not having been already fully satisfied is in respect of a secured debt to which the U P Zamindars Debt Reduction Act 1952 applies the Special Judge shall upon reduction of the amount of the debt in accordance with the provisions of the said Act —

(a) inform the Collector of the reduction so made, and

(b) certify the amount if any of the decree aforesaid which is not legally recoverable otherwise than out of the compensation and rehabilitation grant payable to the landlord in respect of the mortgaged estate

and the decree transmitted to the Collector under section 19 shall be deemed to have been amended accordingly

Insertion of new sections 23-A and 23-B in U P Act XXV of 1934.

14 After section 23 of the Principal Act the following shall be added as new sections 23 A and 23 B

Compensation and rehabilitation grant to be placed at the disposal of the Collector

23 A The Collector shall require the Compensation Officer and Rehabilitation Grants Officer as may be necessary to place at his disposal in pursuance of section 70 of the U P Zamindari Abolition and Land Reforms Act 1950 the amount of compensation money and rehabilitation grant payable to the landlord in respect of his proprietary rights in land reported to be liable to attachment or sale under the provisions of sub-section (2) of section 19

Liquidation of secured debt recoverable from compensation and rehabilitation grant

23 B (1) Without prejudice to the provisions of section 8 of the U P Zamindars Debt Reduction Act 1952 the amount or the bonds on account of compensation or rehabilitation grant received by the Collector in pursuance of the requisition under section 23 A shall be expended or utilised by the Collector in liquidation of the amount of the secured debt which having regard to the provisions of the U P Zamindars Debt Reduction Act 1952, was secured on the proprietary rights in land in respect of which such money has been received

(2) If any balance out of the compensation or rehabilitation grant received by the Collector in pursuance of the requisition under section 23 A remains in the hands of the Collector after utilising the same in accordance with the provisions of sub section (1) such balance shall be utilised by the Collector in discharging the debts other than the debts referred to in the said sub section in order of priority

Amendment of section 24 of U P Act XXV of 1934

15 For sub section (1) of section 24 of the Principal Act the following shall be substituted

Realisation of value of debtor's property and application of proceeds for liquidation of debts

(1) The Collector shall then realise the value of such of the debtor's property other than proprietary rights in land but including proprietary rights in land in the areas which on the 7th day of July 1949 were included in a Municipality or a Notified Area under the provisions of the U P Municipalities Act 1916 or a cantonment under the provisions of the Cantonment Act 1924 or a Town Area under the provisions of U P Town Areas Act 1914 as shall have been reported by the Special Judge under the provisions of sub section (2) of section 19 to be liable to attachment or sale

Provided that the Collector before passing orders under this section of the sale of any property shall hear any objection which the debtor may have to make to the sale of that property

Provided also that notwithstanding any thing in any other section of this Act the Collector may if he considers fit sell along with any building disposed of under this section the proprietary rights of the applicant in any land occupied by such building or appurtenant thereto

Provided further that the Collector shall leave the debtor at least one residential house and necessary furniture thereof if—

(a) the debtor owns such house and furniture and desires to retain it, and

(b) such house and furniture is free from any mortgage or charge

Deletion of sections 25 to 28 30 to 34 and 36 to 42 of U P Act XXV of 1934

16 Sections 25, 26 27, 28, 30, 31 32 33 34, 36, 37 38 39 40 41 and 42 of the Principal Act shall be deleted

Amendment of section 44 of U P Act XXV of 1934

17 In sub section (1) of section 44 of the Principal Act—

(1) in clause (a) for the words and figures section 23 or section 24 the words and figures section 23 section 23 B or section 24 shall be substituted and

(2) clauses (b) and (c) shall be deleted.

Amendment of section 48 of U P Act XXV of 1934

18 In section 48 of the Principal Act—

(1) in sub section (1) the words or has granted the mortgage under section 25 or has ordered the payment of instalments under section 27 or 28 or has transferred the whole of the landlord s proprietary rights in unprotected land under section 28 the words and figures section 23 B or section 24 shall be substituted and

(2) sub section (2) shall be deleted

Deletion of sections 55 and 56 of U P Act XXV 1934

19 Sections 55 and 56 of the Principal Act shall be deleted

Deletion of schedule of U P Act XXV of 1934

20 The schedule to the Principal Act shall be deleted.

Insertion of a new section 60 in U P Act XXV of 1934

21 After section 59 of the Principal Act the following shall be added as a new section 60

Exercise of powers of the Collector by the Special Judge

60—The powers exercisable by the Collector under Chapter V may if the State Government so directs be exercised by the Special Judge either generally or in any area, as may be specified

Saving

22 Where any provision of the Principal Act has been repealed altered or amended by this Act, then, unless a different intention appears the repeal alteration or amendment shall not—

(a) revive any thing not in force or existing at the time at which the repeal alteration or amendment takes effect,

(b) affect the previous operation of any provision so repealed altered or amended or any thing duly done or suffered thereunder,

(c) affect any right title, privilege obligation or liability acquired accrued or incurred under any provision so repealed, altered or amended, or

(d) affect any remedy or any investigation or legal proceeding commenced before this Act shall have come into operation in respect of any such right title, privilege obligation or liability as aforesaid,

and any such remedy may be enforced and any such investigation or legal proceedings may be continued and concluded in accordance with the provisions of the Principal Act as amended by this Act

23 For the settlement of doubts it is hereby declared that the repeal or amendment of any provision of the Principal Act by this Act shall not affect

Settlement of doubts

(a) subject to the provisions of section 6 of the U P Zamindari Abolition and Land Reforms Act 1950 the continued operation of any mortgage granted under section 25 herein deleted, of the Principal Act where possession over the mortgage property was delivered to the mortgagee,

(b) the liability of the debtor for the payment of any instalment ordered to be paid by him in accordance with section 27 or 28, herein deleted of the Principal Act or the right of the State Government to recover such instalments or any part thereof as arrears of land revenue under section 29 of the said Act,

(c) the operation of any order for the issue of bonds already made under section 30 or 31, herein deleted, of the Principal Act or the continued validity of any bonds already issued thereunder,

(d) the transfer or sale of proprietary rights in land made under sections 31 33 and 34 herein deleted of the Principal Act

(e) the operation of any order for the transfer or sale of proprietary rights in land made under sections 31 33 and 34 where possession over the proprietary rights was also delivered to the transferee or as the case may be to the purchaser in pursuance thereof

(f) the charge created under section 40 of the Principal Act notwithstanding any thing in the Oudh Settled Estates Act 1917 or the U P Estates Act 1920 on the death of the debtor after the date of the application under section 4 of the Principal Act

24 Para II (pertaining to the U P Encumbered Estates Act 1934) of Schedule to the U P Agricultural Tenants (Acquisition of Privileges) (Amendment) and Miscellaneous Provisions Act 1950 shall be deleted and the orders issued under section 10 of the said Act for the stay of proceedings under Chapter V of the U P Encumbered Estates Act, 1934, shall stand repealed

Amendment of schedule of U P Act VII of 1950

25 For the purposes of facilitating the application of the Principal Act as amended by this Act to any pending proceeding or investigation or enforcement of any right, privilege, obligation or liability acquired accrued or incurred under the Principal Act prior to its amendment by this Act, any Court or

Powers of Court and other authority for adaptation

other authority may construe the provisions of the Principal Act as amended by this Act with such alteration or modification, not effecting the substance as may be necessary or proper to adapt it to the matter before the Court or the authority as the case may be

Powers to remove difficulties

26 The State Government may, for the purposes of removing any difficulty particularly in relation to the transition from the provisions of the Principal Act to the provisions of that Act as amended by this Act by order—

(a) direct that the Principal Act amended as aforesaid shall during the period of two years next after the commencement of this Act have effect subject to such adaptation whether by way of modification, addition or omission as it may deem to be necessary and expedient and

(b) make such other temporary provisions for the purposes of removing any difficulty as aforesaid as may be so specified

PSUP A P 116 Genl (Leg)—1955—2,970

RAMPUR REGISTRATION OF MARRIAGES (REPEAL) ACT, 1954

(U P Act No XIV of 1954)

[*Authoritative English Text*† *of the Rampur Registration of Marriages (Nasan) Adhiniyam* 1954]

AN

ACT

to repeal the Rampur State Acts relating to registration of Hindu and Muslim marriages

WHEREAS it is expedient to repeal the Rampur State Acts relating to registration of Hindu and Muslim marriages,

It is hereby enacted as follows

Short title and commencement

1 (1) This Act may be called the Rampur Registration of Marriages (Repeal) Act, 1954

(2) It shall come into force at once

Repeal of Rampur Registration of Muslim Marriages Act 1941 and the Rampur Registration of Hindu Marriages Act 1945

2 The Qanoon Indraj Nikah Ahle Islam Riyasat Rampur 1941 (the Rampur State Registration of Muslim Marriages Act, 1941) and the Qanoon Indraj Biwah Ahle Hindu Riyasat Rampur 1945 (the Rampur State Registration of Hindu Marriages Act, 1945) are hereby repealed

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*For Statement of Objects and Reasons please *see U P Gazette (Extraordinary)* dated March 26 1954

Passed in Hindi by the Uttar Pradesh Legislative Council on March 31 1954 and by the Uttar Pradesh Legislative Assembly on April 26 1954

Received the assent of the President on June 19 1954 under Article 201 of the Constitution of India and was published in the *Uttar Pradesh Gazette Extraordinary*, dated August 28 1954

†Published in the *Uttar Pradesh Gazette Extraordinary*, dated August 28 1954

PSUP—A P 174 Genl (Leg)—1955 2,970

THE UTTAR PRADESH (TEMPORARY) ACCOMMODATION REQUISITION (AMENDMENT) ACT 1954 *

[U P Act XV of 1954]

[*Authoritative English Text of the Uttar Pradesh (Temporary) Accommodation Requisition (Sansodhan) Adhiniam 1954*]†

AN

ACT

to amend the Uttar Pradesh (Temporary) Accommodation Requisition Act 1947

WHEREAS the U P (Temporary) Accommodation Requisition Act 1947 will expire on September 30 1954 and it is expedient to provide for continuance of the said Act until September 30 1958

It is hereby enacted in the Fifth Year of our Republic as follows

Short title and commencement

1 (1) This Act may be called the Uttar Pradesh (Temporary) Accommodation Requisition (Amendment) Act 1954

* For Statement of Objects and Reasons please see *U P Gazette (Extraordinary)* dated August 4 1954

Passed in Hindi by the Uttar Pradesh Legislative Assembly on August 23 1954 and by the Uttar Pradesh Legislative Council on September 3 1954

Received the assent of the President on September 25 1954 under Article 201 of the Constitution of India and was published in the *Uttar Pradesh Gazette Extraordinary* dated September 28 1954

†Published in the *Uttar Pradesh Gazette Extraordinary* dated September 28 1954

(2) It shall come into force at once

Amendment of section 1 of U P Act XXV of 1947

2 In sub section (5) of section 1 of the U P (Temporary) Accommodation Requisition Act 1947 as amended from time to time for the figure 1954 the figure 1958 shall be *substituted*

PSUP A P 66 GenI (Leg)—1954—2970

THE U P ELECTRICITY (TEMPORARY POWERS OF CONTROL) (AMENDMENT) ACT 1954*

[U P ACT XVI OF 1954]

[*Authoritative English Text of the Uttar Pradesh Electricity (Temporary Powers of Control) (Sanshodhan Adhiniyam) 1954*]†

AN ACT

U P Act VI of 1947

to amend the U P Electricity (Temporary Powers of Control) Act 1947 for certain purposes

U P Act VI of 1947

WHEREAS it is expedient to amend the U P Electricity (Temporary Powers of Control) Act 1947 for the purposes hereinafter appearing

It is hereby enacted as follows

Short title and commencement

1 (1) This Act may be called the Uttar Pradesh Electricity (Temporary Powers of Control) (Amendment) Act 1954

(2) It shall come into force at once

Amendment of section 1 (4) of U P Act VI of 1947

2 In sub section (4) of section 1 of the U P Electricity (Temporary Powers of Control) Act 1947 for the figure 1954 the figure 1956 shall be *substituted*

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*For statement of Objects and Reasons please *see Uttar Pradesh Gazette (Extraordinary)* dated April 24 1954

Passed in Hindi by the Uttar Pradesh Legislative Assembly on August 26 1954 and by the Uttar Pradesh Legislative Council on September 3 1954

Received the assent of the President on September 28 1954 under Article 201 of the Constitution of India and was published in the *Uttar Pradesh Gazette Extraordinary* dated September 30 1954

†Published in the *Uttar Pradesh Gazette Extraordinary* dated September 30 1954

PSUP A P 79 Genl (Leg)—1954—2 970

UTTAR PRADESH (TEMPORARY) CONTROL OF RENT AND EVICTION (AMENDMENT) ACT 1954*

(U P Act no XVII 1954)

[*Authoritative English Text*† *of the Uttar Pradesh (Temporary) Control of Rent and Eviction (Sanshodhan) Adhiniyam* 1954]

AN

ACT

further to amend the U P (Temporary) Control of Rent and Eviction Act 1947 *for certain purposes*

U P Act III of 1947

WHEREAS the U P (Temporary) Control of Rent and Eviction Act 1947 was continued by the U P (Temporary) Control of Rent and Eviction (Amendment) Act 1952 which will expire on September 30 1954

U P Act XXIV of 1952

AND WHEREAS it is necessary to provide for the continuance of the said Act until September 30 1958 and to amend it for the purposes hereinafter appearing

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*For Statement of Objects and Reasons please *see Uttar Pradesh Gazette (Extraordinary)* dated August 20 1954.

Passed in Hindi by the Uttar Pradesh Legislative Assembly on September 7 1954 and by the Uttar Pradesh Legislative Council on September 18 1954

Received the assent of the President on September 30 1954 under Article 201 of the Constitution of India and was published in the *Uttar Pradesh Gazette Extraordinary* dated September 30 1954

†Published in the *Uttar Pradesh Gazette Extraordinary*, dated September 30 1954

It is hereby enacted by the Uttar Pradesh Legislature in the fifth year of the Republic of India as follows

1 (1) This Act may be called the Uttar Pradesh (Temporary) Control of Rent and Eviction (Amendment) Act, 1954 — Short title and commencement

(2) It shall come into force with effect from September 30 1954

2 In section 1 of the U P (Temporary) Control of Rent and Eviction Act 1947 (hereinafter called the Principal Act)— — Amendment of section 1 of U P Act III of 1947

(1) *for* sub section (2 *a*) the following shall be *substituted*

(2 *a*) It shall apply to every municipality and notified area established under the U P Municipalities Act 1916 and to areas situated within 2 miles of such municipality or notified area — U P Act II of 1916

Provided however that the State Government if satisfied that it is necessary so to do in the interest of the general public residing in a town area constituted under the Town Areas Act 1914 or in any other area may by notification in the official *Gazette* apply the Act or any part thereof to such Town Area or other area — U P Act II of 1914

Provided further that the State Government may likewise

(i) cancel or amend any notification issued under the preceding proviso or

(ii) declare that the Act shall cease to apply to any municipality or notified area or other area as may be specified

and the provisions of section 6 of the U P General Clauses Act 1904 shall apply upon such cancellation or declaration as if this Act or the portion had been an enactment repealed in the local area concerned by an Uttar Pradesh Act — U P Act I of 1904

Provided also that nothing in this Act shall apply—

(i) to any premises belonging to the State Government or Central Government

(ii) to any tenancy or other like relationship created by a grant from the State Government or Central Government in respect of premises taken on lease or requisitioned by such Government

(iii) to any tenancy or other relationship in respect of any plot of land not covered by roofed structure

(2) in sub section (4) *for* the figures 1954 the figures 1958 shall be *substituted*

Amendment of section 2 of U P Act III of 1947

3 In section 2 of the Principal Act—

(1) *for* the full stop at the end of clause (a) a comma shall be *substituted* and thereafter the following shall be *added* as a fresh para

But does not include any accommodation used as a factory or for an industrial purpose where the business carried on in or upon the building is also leased out to the lessee by the same transaction

(2) in clause (c) *for* the words of the landlord and tenant in relation to his sub tenant the words of such person shall be *substituted*

(3) in clause (g) the words and includes any person holding or occupying any accommodation as a sub tenant shall be *deleted*

(4) after clause (g) the following shall be *added* as a new clause (h)—

(h) vacant where used with reference to any accommodation includes an accommodation about to fall vacant an intimation whereof has been sent by the tenant or the landlord to the District Magistrate

Amendment of section 3 of U P Act III of 1947

4 In section 3 of the Principal Act—

(1) *for* clause (a) of sub section (1) the following shall be *substituted*

(a) that the tenant is in arrears of rent for more than three months and has failed to pay the same to the landlord within one month of the service upon him of a notice of demand

(2) in clause (c) of the said sub section *after* the word permission the words in writing shall be *inserted*

(3) *after* clause (f) of the said sub section the following shall be *added* as a new clause (g)—

(g) that the tenant was allowed to occupy the accommodation as a part of his contract of employment under the landlord and his employment has been determined

(4) *for* sub sections (2) to (4) the following shall be *substituted*

(2) Where any application has been made to the District Magistrate for permission to sue a tenant for eviction from any accommodation and the District Magistrate grants or refuses to grant the permission the party aggrieved by his order may within 30 days from the date on which the order is communicated to him apply to the Commissioner to revise the order

(3) The Commissioner shall hear the application made under sub section (2) as far as may be within six weeks from the date of making it and he may if he is not satisfied as to the correctness legality or propriety of the order passed by the District Magistrate or as to the regularity of proceedings held before him alter or reverse his order or make such other order as may be just and proper

(4) The order of the Commissioner under sub section (3) shall subject to any order passed by the State Government under section 7 F be final

Amendment of section 3 A of U P Act III of 1947

5 *For* section 3 A of the Principal Act the following shall be *substituted*

Determination of annual reasonable rent by the District Magistrate

3 A (1) The District Magistrate may on the application of a person who has been allotted any accommodation to which sub clause (1) of clause (*f*) of section 2 applies declare the annual reasonable rent payable therefor The District Magistrate may likewise on the application of a person who has been allotted any accommodation or of the landlord determine the reasonable annual rent of the accommodation to which any of the remaining provisions of the said clause may be applicable

(2) In determining the reasonable annual rent the District Magistrate shall take into account—

(*a*) if the accommodation was constructed on or after July 1 1946 the cost of land and the cost of construction maintenance and repairs there of its situation and any other matter which in the opinion of the District Magistrate is material and

(*b*) if it is accommodation falling under sub clause (2) or para (i) of sub clause (3) of clause (*f*) of section 2 the principles therein set forth and

(*c*) if it is accommodation falling under para (ii) of sub clause (3) of clause (*f*) aforesaid the principles set forth in clause (*a*) of sub section (1) of section 6

(3) Subject to the result of any suit filed under sub section (4) of section 5 the rent declared or determined by the District Magistrate under this section shall be the annual reasonable rent of the accommodation

Amendment of section 4 of U P Act III of 1947

6 *For* section 4 of the Principal Act the following shall be *substituted*

Prohibition against taking premium

(4) It shall not be lawful for a landlord to take or receive for admitting a tenant to any accommodation any premium or other additional payment of any sort whatsoever over and above the rent payable therefor under the provision of this Act

Amendment of section 5 of U P Act III of 1947

7 *For* sub section (4) of section 5 of the Principal Act the following shall be *substituted*

(4) If the landlord or the tenant claims that the annual reasonable rent of any accommodation to which the Act applies is inadequate or excessive or hat the reasonable annual rent declared by the District Magistrate under section 3 A is not correct or if the tenant claims that the agreed rent is higher than the annual reasonable rent he may institute a suit for declaration or as the case may be for fixation of rent in the Court of the Munsif having territorial jurisdiction if the annual rent claimed or payable is Rs 500 or less and in the Court of the Civil Judge having territorial jurisdiction if it exceeds Rs 500 provided that the Court shall not vary the agreed rent unless it is satisfied that the transaction was unfair and in the case of lease for a fixed term made before April 1, 1942 that the term has expired

Insertion of a new section 5 A in U P Act III of 1947

8 *After* section 5 of the Principal Act the following shall be *added* as a new section 5 A—

5 A (1) Where the tax referred to in clause (*i*) of sub section (1) of section 128 of the U P Municipalities Act 1916 has been increased after July 1 1946 in the case of any accommodation constructed before the said date the landlord may on and from the commencement of the U P Control of Rent and Eviction (Amendment) Act 1954 add, notwithstanding anything in this Act or any order made thereunder to the reasonable annual rent payable for the accommodation by the tenant an amount equal to one third of the difference between the amount of the tax assessed before July 1946 and the amount assessed after this date The amount so added to the rent shall be payable by the tenant to the landlord along with the rent

(2) Where the question arises whether the tax referred to in sub section (1) has increased in respect of any accommodation it shall be referred to the District Magistrate who shall determine the same

Amendment of section 6 of U P Act III of 1947

9 In clause (*b*) of sub section (1) of section 6 of the Principal Act *for* the words the cost of construction the words cost of land and the construction shall be *substituted*

Amendment of section 7 B of U P Act III of 1947

10 In section 7 B of the Principal Act—

(1) *for* the words in arrears of rent for more than three months in sub section (1) the words in arrears of rent or any instalment thereof (where it is payable in instalments) for more than three months shall be *inserted*

(2) *for* the words serve a notice in sub section (3) the words serve by registered post or otherwise a notice shall be *inserted*

(3) both the provisos in sub section (6) shall be *deleted*

11 *For* sub section (8) of section 7 E of the Principal Act the following shall be *substituted* — Amendment of section 7 E of U P Act III of 1947

(8) No appeal shall lie from the order of the Munsif passed under sub sections (5) and (6) which shall be final

12 In section 7 F of the Principal Act *after* the word and figure section 7 the words or directing a person to vacate any accommodation under section 7 A shall be *inserted* — Amendment of section 7 F of U P Act III of 1947

13 *For* section 8 of the Principal Act the following shall be *substituted* — Amendment of Section 8 of U P Act III of 1947 Penalty

(8) (1) Any person who contravenes any of the provisions of this Act or any order made in pursuance thereof shall be punishable on conviction with simple imprisonment for a term which may extend to six months or with fine up to Rs 5 000 or with both

(2) Where a person has been convicted for contravention of the provisions of section 4 the Magistrate by whom the case is heard may direct that out of the fine if any imposed and realized from the person so convicted an amount not exceeding the amount paid as premium or as additional payment over and above the rent for admission as a tenant to any accommodation may be paid to the person by whom such payment was made

Provided that any amount paid to the person aforesaid under this section shall be taken into account in awarding compensation to such person in any subsequent claim for compensation or restitution on account of the amount realised in contravention of section 4

(3) Notwithstanding anything contained in section 32 of the Criminal Procedure Code 1898 it shall be lawful for a Magistrate of the First Class trying any case under this Act to pass a sentence of fine not exceeding five thousand rupees — V of 1898

PSUP A P 74 Genl (Leg)—1954—2 970

UTTAR PRADESH AGRICULTURAL INCOME TAX (AMENDMENT) ACT 1954*

†(U P Act No. XVIII of 1954)

[‡Authoritative English Text of the Uttar Pradesh Krishi Aaikar (Saushodhan) Adhiniyam, 1954]

AN

ACT

U P Act III of 1949 — *to amend the United Provinces Agricultural Income Tax Act, 1948 for certain purposes*

U P Act III of 1949 — WHEREAS it is expedient to amend the United Provinces Agricultural Income Tax Act 1948 for certain purposes

It is hereby enacted in the fifth year of Our Republic as follows—

Short title and commencement. — 1 (1) This Act may be called the Uttar Pradesh Agricultural Income Tax (Amendment) Act 1954

(2) This section shall come into force at once, and the remaining sections shall come into force with effect from July 1 1954

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* For Statement of Objects and Reasons please *see* U P Gazette (Extraordinary) dated May 10, 1954

†Passed in Hindi by the Uttar Pradesh Legislative Assembly on September 2 1954 and by the Uttar Pradesh Legislative Council on September 15 1954

Received the assent of the Governor on October 1 1954 under Article 200 of the Constitution of India and was published in the Uttar Pradesh Gazette (Extraordinary) dated October 4 1954

‡Published in the Uttar Pradesh Gazette (Extraordinary) dated October 4 1954

Provided that the assessments for the agricultural years ending on or before the 30th day of June 1954 whether such assessments have or have not been made before the commencement of this Act shall continue to be made as if sections 4 6 15 16 25 and the schedule of the U P Agricultural Income Tax Act 1948 had not been amended by this Act

Amendment of section 2 of U P Act no III of 1949

2 In clause (3) of section 2 of the U P Agricultural Income Tax Act 1948 (hereinafter called the Principal Act) the existing proviso shall be *omitted*

Amendment of section 4 of U P Act no III of 1949

3 In section 4 of the Principal Act—

(*a*) *for* the word and figure Rs 8 000 the word and figure Rs 4 200 shall be *substituted*

(*b*) *substitute* the following *for* the first proviso

Provided that the tax shall not be payable by a person who cultivates not more than 30 acres of land

Explanation—Land covered by a grove or orchard is land cultivated

(*c*) The second proviso shall be *omitted*

Amendment of section 6 of U P Act no III of 1949

4 (1) In sub section (1) of section 6 of the Principal Act the following shall be *substituted* for the existing proviso

Provided that the agricultural income as aforesaid for tea gardens shall be computed in accordance with clause (*b*) of sub section (2)

(2) *For* the existing clause (*a*) of sub section (2) of the said section the following shall be *substituted*

(*a*) Subject to such deductions in respect of agricultural calamities as may be prescribed the income from the land shall be deemed to be an amount equal to its rent multiplied by such multiple not exceeding 12½ as the Land Reforms Commissioner may fix, and different multiples may be fixed for different districts or portions of district and for different classes of groves and orchards

Provided that the Land Reforms Commissioner may direct that the multiple for calculating income from land newly brought under cultivation shall for a specified number of years be such lower figure as may be prescribed

Explanation—In this section rent shall be deemed to be an amount calculated at the latest sanctioned rent rates applicable to hereditary tenants of the highest class of soil in the village in the case of orchards and groves and of similar class of soil in other cases

Insertion of a new section 6 A in U P Act III of 1949

5 *After* section 6 of the Principal Act the following shall be *inserted* as section 6-A

6 A Notwithstanding anything in section 5 or sub section (*1*) of section 6 agricultural income from sale of timber shall be computed in accordance with clause (*b*) of sub section (2) of section 6 after making such further deductions on account of

the cost incurred over the maintenance of trees and the capital cost involved as may be prescribed

Amendment of section 15 of U P Act no III of 1949

6 *After* sub section (3 A) of section 15 of the Principal Act the following shall be *inserted* as a new sub section (3 B)—

(3 B) Along with the notice under sub section (3) the Assessing Authority shall send a statement showing a provisional estimate of the agricultural income which in his opinion accrued to the person during the previous year The estimate shall be prepared in accordance with the provisions of clause *(a)* of sub section (2) of section 6 and be in such form and contain such particulars as may be prescribed

Amendment of section 16 of U P Act no III of 1949

7 In sub section (4) of section 16 of the Principal Act *after* the words his judgment the words with due regard to the statement if any sent under sub section (3 B) of section 15 notwithstanding any option exercised under sub section (1) of section 6 shall be *inserted*

Amendment of section 25 of U P Act no III of 1949

8 In section 25 of the Principal Act *for* the words and figure sub section (3) the words and figure sub sections (3) and (3 B) shall be *substituted*

Amendment of the schedule to U P Act no III of 1949

9 (1) *For* Part I of the schedule to the Principal Act the following shall be *substituted*

Part I	*Rate*
1 On the first Rs 1 500 of total agricultural income	Nil
2 On the next Rs 3,500 of total agricultural income	1 anna in the rupee
3 On the next Rs 10 000 of total agricultural income	2 annas in the rupee
4 On the next Rs 10 000 of total agricultural income	4 annas in the rupee
5 On the next Rs 10 000 of total agricultural income	8 annas in the rupee
6 On the balance of total agricultural income	10 annas in the rupee

These rates are subject to the conditions that

(a) No Agricultural Income Tax shall be payable on a total agricultural income which does not exceed Rs 4,200 and

(b) in the case of assessees with income up to Rs 5 000 the Agricultural Income Tax payable shall not exceed half the amount by which the total agricultural income exceeds Rs 4 200

(2) Part II of the schedule to the Principal Act shall be *omitted*

PSUP A P 89 Genl (Leg)—1955—2 970.

UTTAR PRADESH APPROPRIATION (FIRST SUPPLEMENTARY 1954-55) ACT, 1954*

(U. P. ACT NO. XIX OF 1954)

[*Authoritative English Text of the Uttar Pradesh Vin yog* (1954-55 *ka Prathum Purak*) *Adh vam*, 1954]†

AN

ACT

to authorise payment and appropriation of certain sums from and out of the Consolidated Fund of the State to the service of the year ending thirty-first day of March 1955

WHEREAS it is expedient to authorize payment and appropriation of certain sums from and out of the Consolidated Fund of the State to the service of the year ending on the thirty-first day of March 1955

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*For Statement of Objects and Reasons in English please see *U. P. Gazette (Extraordinary)* dated September 29, 1954.

Passed in Hindi by the Uttar Pradesh Legislative Assembly on September 22, 1954 and by the Uttar Pradesh Legislative Council on September 24, 1954.

Received the assent of the Governor on October 1, 1954 under Article 200 of the Constitution of India and was published in the *Uttar Pradesh Gazette (Extraordinary)* dated October 4, 1954.

†Published in the *Uttar Pradesh Gazette (Extraordinary)* dated October 4, 1954.

It is hereby enacted in the fifth year of the Republic of India as follows

1 This Act may be called the Uttar Pradesh Appropriation (First Supplementary 1954 55) Act, 1954 — Short title

2 From and out of the Consolidated Fund of Uttar Pradesh there may be paid and applied sums not exceeding those specified in column 3 of the Schedule amounting in the aggregate to the sum of Rs 1 59,53,200 (Rupees one crore fifty nine lakhs, fifty three thousand and two hundred only) towards defraying the several charges which will come in course of payment during the year ending on the thirty first day of March, 1955 in respect of the services and purposes specified in column 2 of the Schedule — Issue of Rs 1 59 53 200 out of the Consolidated Fund of Uttar Pradesh for the year 1954 55

3 The sums authorized to be paid and applied from and out of the Consolidated Fund of Uttar Pradesh by this Act shall be appropriated for the services and purposes expressed in the Schedule in relation to the year ending on the thirty first day of March 1955 — Appropriation

SCHEDULE

Number of Vote	Services and purposes	Sums not exceeding— Voted by the Legislative Assembly	Charged on the Consolidated Fund of the State	Total
1	2	3		
	A—REVENUE ACCOUNT			
		Rs	Rs	Rs
2	Land Revenue	29 800		29 800
9	Irrigation Works met from Revenue	93 500		93 500
10	Charges on Irrigation Establishment	22 600		22 600
12	Charges on account of General Administration	17 500		17 500
16	Jails	36 300		36 300
17	Police	500		500
18	Education	15 19 300		15 19 300
19	Medical	2 17 600		2 17 600
20	Public Health	65 400		65 400
21	Agricultural Development and Research	400		400
22	Agricultural Engineering and Colonisation	100		100
23	Veterinary	100		100
25	Charges on Establishment of Electricity Schemes	100		100
27	Industries	500		500
28	Labour and Statistics	18 000		18 000
30	Expenditure on Public Works met from Revenue	800		800
31	Improvement of Communications (Financed from Central Road Fund Account)	13 09 400		13 09 400
32	Charges on Public Works Establishment	300		300
33	Grants in aid of Civil Works	20 00 000		20 00 000
34	Famine Relief	55 100		55 100
38	Miscellaneous Charges	3 62 200		3 62 200
39	Improvement and Uplift of Scheduled and Backward Classes	6 20 000		6 20 000
41	Planning and Co ordination	40 09 600		40 09 600
	Total A	1 03 79 100		1 03 79 100

Number of Vote	Services and purposes	Voted by the Legislative Assembly	Charged on the Consolidated Fund of the State	Total
		Sums not exceeding—		
1	2		3	
	B—CAPITAL EXPENDITURE OUTSIDE THE REVENUE ACCOUNT			
		Rs	Rs	Rs
42	Construction of Irrigation Works outside the Revenue Account	6 00 200		6 00 200
45	Outlay on Civil Works outside the Revenue Account	900		900
46	Capital outlay on Electricity Schemes	100		100
	Total B	6 01 200		6 01 200
	C—DISBURSEMENT OF LOANS AND ADVANCES			
		Rs	Rs	Rs
50	Loans and advances bearing Interest	49 72 900		49 72 900
	Total C	49 72 900		49 72 900
	GRAND TOTAL	1 59 53 200		1 59 53 200

PSUP—A P 3 Genl (Leg)—1955—2,970

THE UTTAR PRADESH LAND REFORMS (AMENDMENT) ACT 1954*

(U P Act No XX of 1954)

[Authoritative English Text of the Uttar Pradesh Bhoomi Vyawastha (Sanshodhan) Adhiniyam 1954]**

An
Act

to amend the U P Zamindari Abolition and Land Reforms Act, 1950, and other laws relating to land tenure

U P Act I of 1951

U P Act I of 1951

Whereas it is expedient to amend the U P Zamindari Abolition and Land Reforms Act 1950 and other laws relating to land tenure for the purposes he ernafter appearing

It is hereby enacted as follows

Short title extent and commencement

1 (1) This Act may be called the Uttar Pradesh Land Reforms (Amendment) Act 1954

(2) It extends to the whole of Uttar Pradesh except the areas which on the 7th day of July 1949 were included in a municipality or a notified area under the provisions of the U P Municipalities Act 1916 or a cantonment under the provisions of the Cantonment Act 1924, or a town area under the provisions of the U P Town Areas Act 1914

*For statement of Objects and Reasons please see U P *Gazette* (Extraordinary) dated May 10 1954

Passed in Hindi by the Uttar Pradesh Legislative Assembly on September 20 1954 and by the Uttar Pradesh Legislative Council on September 29 1954

Received the assent of the President on October 9 1954 under Article 201 of the Constitution of India and was published in the Uttar Pradesh *Gazette* Extraordinary dated October 10 1954

**Published in the Uttar Pradesh *Gazette* Extraordinary dated October 10 1954

Provided that in its application to the areas specified in section 2 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act 1950 (hereinafter called the Principal Act) the provisions of this Act shall have effect subject to such exceptions or modifications not affecting the substance as the State Government may by notification in the official *Gazette* specify in this behalf

(3) It shall come into force at once except in the areas specified in section 2 of the Principal Act where it shall subject to any exception or modification made under sub section (2) come into force on such date as the State Government may by notification published in the official *Gazette* appoint and different dates may be appointed for different areas

Amendment of Section 2 of U P Act I of 1951

2 In sub section (1) of section 2 of the Principal Act—

(i) sub clause (iv) of clause (*e*) shall be *deleted* and

(ii) *after* clause (*e*) the following shall be *added* as a new clause (*ee*)—

(*ee*) any area which on the 25th day of January 1950 was included in an enclave as defined in the Provinces and States (Absorption of Enclaves) Order 1950 absorbed in Uttar Pradesh under the said Order or

Amendment of Section 3 of U P Act I of 1951

3 In section 3 of the Principal Act—

(*a*) *after* clause (22) the following shall be *added* as a new clause (22 A)—

(22 A) recognised educational institution means an educational institution or a class of institutions declared as such by the State Government by notification in the official *Gazette*

(*b*) in clause (28) for the fullstop at the end a semi colon shall be *substituted* and thereafter the word and shall be *inserted* and

(*c*) *after* clause (28) the following shall be *added* as a new clause (29)—

(29) any reference in Part I to record of rights shall include references as may be necessary to annual registers prepared under section 33 of the U P Land Revenue Act 1901

U P Act III of 1901

Amendment of Section 20 of U P Act I 1951

4 (1) In section 20 of the Principal Act—

(*a*) for the words every person who on the date immediately preceding the date of vesting—

(*b*) was or has been deemed to be in accordance with the provisions of this Act—

the following shall be *substituted*—

every person who—

(*a*) on the date immediately preceding the date of vesting was or has been deemed to be in accordance with the provisions of this Act —

(*b*) in sub clause (i) of clause (*a*) for the words clause (i) of sub-section (*b*) the words sub clause (i) of clause (*b*) shall be *substituted*,

(*c*) in sub clause (ii) of clause (*a*) *for* the words clause (i) of sub section (*b*) the words sub-clause (i) of clause (*b*) shall be *substituted*

(*d*) in sub clause (i) of clause (*b*) *for* the figure 32 the figure 33 shall be *substituted*

(*e*) in sub clause (ii) of clause (*b*) *for* the words record of rights for the year 1356 *Fasli* prepared under clause (*e*) of section 32 of the words Khasra or Khataunt of 1356 *Fasli* prepared under sections 28 and 33 respectively of shall be *substituted* and

(*f*) *after* explanation II the following shall be *added* as explanations III and IV—

Explanation III—For the purposes of explanation II an entry shall be deemed to have been corrected before the date of vesting if an order or decree of a competent court requiring any correction in records had been made before the said date and had become final even though the correction may not have been incorporated in the records

Explanation IV—For purposes of this section occupant as respects any land does not include a person who was entitled as an intermediary to the land or any share therein in the year 1356 *Fasli*

(2) A person recorded as occupant in 1356 *Fasli* of land referred to in the proviso to sub section (3) of section 27 of the U P Tenancy (Amendment) Act 1947 shall not become an *adhivasi* of such land under sub clause (i) of clause (*b*) of section 20 of the Principal Act and accordingly in the said sub-clause for the words other than grove land or land to which section 16 applies there shall be substituted the words other than grove land or land to which section 16 applies or land referred to in the proviso to sub section (3) of section 27 of the U P Tenancy (Amendment) Act 1947 and the amendment so made shall be deemed to have had effect from the date of commencement of the Principal Act

U P Act X of 1947

Amendment of Section 21 of U P Act I of 1951

5 In section 21 of the Principal Act—

(1) In clause (*d*) or sub section (1) *for* the words a mortgagee the words a mortgagee in actual possession shall be *substituted*

(2) *For* clause (*h*) of sub section (1) the following shall and be deemed to have been *substituted* with effect from the date of commencement of the Principal Act—

(*h*) a tenant of *Sir* of land referred to in sub clause (*a*) of clause (i) of the explanation under section 16 a sub tenant referred to in sub clause (ii) of clause (*a*) of section 20 or an occupant

referred to in sub clause (i) of clause (b) of the said section where the land holder or if there are more than one land holder all of them were person of persons belonging—

(a) if the land was let out or occupied prior to the ninth day of April, 1946 both on the date of letting or occupation as the case may be and on the ninth day of April 1946, and

(b) if the land was let out or occupied after the ninth day of April 1946 on the date of letting or occupation

to any one or more of the classes mentioned in sub-section (1) of section 157

(3) *After* clause (h) in sub section (1) the following shall be *inserted* as a new clause (i)—

(i) a lessee holding under a lease from a court under sub section (1) of section 252 of the U P Tenancy Act 1939

(4) in sub section (2) the following shall be *inserted after* the word thereof —

as an *asami* from year to year

Amendment of Section 23 of U P Act I of 1951

6 Clause (b) of sub section (1) of section 23 of the Principal Act shall be *deleted*

Insertion of new chapter II A in U P Act I of 1951

7 *After* Chapter II of the Principal Act the following shall be *inserted* as new Chapter II A—

Chapter II A—**Evacuee Property**

Definition

26 A In this Chapter and Schedule V, unless there is anything repugnant in the subject or context the words and expressions Custodian Evacuee and Evacuee Property shall have the meaning assigned to them in the Administration of Evacuee Property Act 1950

Application of the Act to evacuee property

26 B The provisions of this Act in their application to evacuee property shall have effect subject to the modifications set out in Schedule V

Insertion of a new Section 50-A in U P Act I of 1951

8 *After* section 50 of the Principal Act the following shall be *inserted* as a new section 50 A—

Power to transfer appeals to Civil Judges

50 A (1) A District Judge may transfer to any Civil Judge under his administrative control any appeals under section 50 from the order of the Compensation Officer pending before him

(2) Appeals transferred under this section shall be disposed of in accordance with the procedure applicable to disposal of appeals by the District Judge under section 50

Amendment of Section 51 of U P Act I of 1951

9 In section 51 of the Principal Act *between* the words "section 50 and on the words or of a Civil Judge passed under section 90 A as the case may be shall be *inserted*

Insertion of a new Section 57 A in U P Act I of 1951

10 *After* section 57 of the Principal Act the following shall be *inserted* as new section 57 A—

Power to transfer appeals to Civil Judges

57 A (1) A District Judge may transfer to any Civil Judge under his administrative control any appeals under section 57 from the order of the Compensation Officer pending before him

(2) Appeals transferred under this section shall be disposed of in accordance with the procedure applicable to disposal of appeals by the District Judge under section 57

Amendment of Section 58 of U P Act I of 1951

11 In section 58 of the Principal Act *between* the words section 57 and on the words or of a Civil Judge passed under section 57 A as the case may be shall be *inserted*

Amendment of Section 82 of U P Act I of 1951

12 In sub section (2) of section 82 of the Principal Act the words relevant extracts from the record of rights and shall be *deleted*

Amendment of Section 117 of U P Act I of 1951

13 In section 117 of the Principal Act—

(a) item (iv) shall be *deleted*

(b) in item (vi) *between* the figure and word 18 and apply the words and figures or any land referred to in section 9 shall be *inserted* and

(c) *for* the second proviso the following shall be *substituted*

Provided further that the State Government may at any time likewise amend or cancel the notification made under this sub section in respect of any land or thing aforesaid whether generally or in the case of any Gaon Samaj and resume such land or thing and whenever the State Government so resumes the land or thing the Gaon Samaj shall be entitled to receive and be paid compensation on account of the development alone if any effected by it in or over the land or thing

Amendment of Section 117 A of U P Act I of 1951

14 In section 117 A of the Principal Act *after* sub section (4) the following shall be *inserted* as a new sub section (5)—

(5) The provisions of the first and second provision to section 117 shall *mutatis mutandis* apply to resumption of land and other things vested in a local authority under sub section (1)

Amendment of Section 118 of U P Act I of 1951

15 In section 118 of the Principal Act—

(i) in sub section (1) *between* the words management and and comma and the word preservation shall be *inserted* and the words public wells shall be *deleted* , and

(ii) in clause (i) of sub section (2) the word wells shall be *deleted*

16 In section 119 of the Principal Act *between* the words superintendence and and comma and the word preservation shall be *inserted*

Amendment of Section 119 of U P Act I of 1951

17 *After* section 123 of the Principal Act the following shall be *added* as a new section 123 A—

Insertion of a new Section 123-A in U P Act I of 1951

Penalty for causing loss waste or misapplication of money or property of the Gaon Panchayat

123 A (1) Every member of the Gaon Panchayat any joint committee or any other committee constituted under this Act shall be liable for the loss waste or misapplication of any property vested in the Gaon Samaj under this Act if such loss waste or misapplication is a direct consequence of his neglect or misconduct while a member of the Gaon Panchayat Joint Committee or other committee and a suit for compensation may be instituted against him by a member of the Gaon Sabha residing within the circle with the previous sanction of the prescribed authority or by the Gaon Panchayat or by the Committee established under section 121

(2) If the prescribed authority sanctions the institution of a suit under sub section (1), or refuses to grant the sanction the member aggrieved may within 30 days of such sanction or refusal appeal to the State Government or an appellate prescribed authority against the said sanction or refusal

(3) The State Government may institute a suit mentioned in sub section (1) on its own initiative

18 *After* section 127 of the Principal Act the following shall be *added* as a new section 127 A—

Insertion of a new Section 127 A in U P Act I of 1951

Suspension and removal of chairman and members of the Committee established under section 121

127 A The State Government may for reasons of misconduct suspend or remove any member or Chairman of the Committee established under section 121 in the manner prescribed

19 In sub section (2) of section 128 of the Principal Act—

Amendment of Section 128 of U P Act I of 1951

(1) *after* clause (*a*) the following shall be *added* as a new clause (*aa*)—

(*aa*) the manner in which and the authority by which compensation to be paid under the second proviso to section 117 shall be assessed and paid

(2) *after* clause (*k*) the following shall be *added* as a new clause (*kk*)—

(*kk*) the summary procedure for determination of damage to and encroachment upon land and things vested in the Gaon Samaj removal of encroachment and assessment and payment of compensation for the damage '

Amendment of Section 134 of U P Act I of 1951

20 In sub section (1) of section 134 of the Principal Act the existing Explanation shall be numbered as Explanation I and thereafter the following shall be *added* as Explanation II—

Explanation II—For the purpose of this section the rent payable by a *sirdar* on the date immediately preceding the date of vesting shall—

(*a*) in respect of land referred to in the proviso to clause (*a*) of sub section (1) of section 246 be an amount arrived at after all the increases have been given effect to and

(*b*) in respect of land to which the proviso to section 247 applies be an amount determined at hereditary rates under that section

Amendment of Section 137 of U P Act I of 1951

21 In section 137 of the Principal Act *after* the existing proviso the following shall be *added* as a second proviso

Provided further that in the cases referred to in Explanation II of section 134 the *sirdar* shall during the period a reduced amount is payable in accordance with section 246 or 247 be liable for payment of one half of the amount payable from time to time

Amendment of Section 139 of U P Act I of 1951

22 In section 139 of the Principal Act—

(1) for words and figure clause (*b*) of section 131 words and figure clauses (*b*) or (*c*) of section 131 shall be *substituted* and

(2) the first proviso shall be *deleted*

Insertion of a new Section 140 A in U P Act I of 1951

23 *After* section 140 of the Principal Act the following shall be *inserted* as a new section 140 A—

Payment of compensation to the land holder

140 A Where a sub tenant has deposited fifteen times the rent payable for the land by the landholder in accordance with the provisions of sub section (2) of section 3 A of the U P Agricultural Tenants (Acquisition of Privileges) Act 1949 and a declaration has been granted to him under section 6 of the said Act the State Government shall on the application of the person who was his land holder on the date of application for deposit under sub-section (2) of section 3 A aforesaid pay to him the amount equal to one third of the amount so deposited

Amendment of Section 153 of U P Act I of 1951

24 *For* existing section 153 of the Principal Act, the following shall be *substituted* —

Interest of a *sirdar* or *asami* not transferable

153 (1) Except as expressly permitted by this Act the interest of a *sirdar* and *asami* shall not be transferable

(2) A *sirdar* may transfer by gift land to a recognised educational institution for a purpose connected with instruction in agriculture horticulture or animal husbandry

25 In section 154 of the Principal Act *between* the words land and to the words other than tea gardens shall be *inserted* — Amendment of Section 154 of U P Act I of 1951

26 *For* sub section (1) of section 156 of the Principal Act the following shall be *substituted*— — Amendment of Section 156 of U P Act I of 1951

(1) No *bhumidhar sirdar* or *asami* shall let for any period whatsoever any land comprised in his holding except—

(*a*) in the cases provided for in section 157 or

(*b*) to a recognised educational institution for a purpose connected with instruction in agriculture horticulture or animal husbandry

27 In sub section (1) of section 157 of the Principal Act— — Amendment of Section 157 of U P Act I of 1951

(1) for clauses (*a*) and (*b*) the following shall be *substituted*

(*a*) an unmarried woman or if married divorced or separated from her husband or whose husband suffers from any of the disqualifications mentioned in clause (*c*) or (*d*) or a widow

(*b*) a minor whose father suffers from any of the disqualifications mentioned in clause (*c*) or (*d*) or has died and

(2) for clause (*e*) the following shall be *substituted*—

(*e*) prosecuting studies in a recognised institution and does not exceed 25 years in age and whose father suffers from any of the disqualifications mentioned in clause (*c*) or (*d*) or has died

28 In sub section (2) of section 169 of the Principal Act *for* the words widow mother step mother father's father father's mother unmarried daughter or unmarried sister' the words widow widow of a male lineal descendant in the male line of descent mother daughter father's mother son's daughter sister or half sister being the daughter of the same father as the deceased shall be *substituted* — Amendment of Section 169 of U P Act I of 1951

29 For the existing section 171 of the Principal Act the following shall be *substituted* — Amendment of Section 171 of U P Act I of 1951

171 Subject to the provisions of section 169 when a *bhumidhar sirdar* or *asami* being a male dies his interest in his holding shall devolve in accordance with the order of succession given below

(*a*) male lineal descendants in the male line of descent

Provided that the son of a predeceased son how low soever shall inherit the share which would have devolved upon the deceased if he had been then alive

(*b*) widow

(*c*) widow of a male lineal descent in the male line of descent who has not re married

(*d*) father

(*e*) mother who has not remarried

(*f*) brother being the son of the same father as the deceased

(*g*) daughter

(*h*) daughter s son

(*i*) brother s son the brother having been son of the same father as the deceased

(*j*) father s father

(*k*) father s mother who has not remarried

(*l*) son s daughter

(*m*) sister

(*n*) half sister being the daughter of the same father as the deceased

(*o*) sister s son

(*p*) brother s son s son

(*q*) father s father s son

(*r*) father s father s son s son

Amendment of Section 172 of U P Act I of 1951

30 In section 172 of the Principal Act—

(1) *for* sub section (1) the following shall be *substituted*—

(1) When a *bhumidhar sirdar* or *asami* who has after the date of vesting inherited an interest in any holding—

(*a*) as a widow widow of a male lineal descendant in the male line of descent mother or father s mother dies marries abandons or surrenders such holding or part thereof or—

(*b*) as a daughter son s daughter sister or half sister being the daughter of the same father as the deceased dies abandons or surrenders such holding or part thereof

the holding or the part shall devolve upon the nearest surviving heir (such heir being ascertained in accordance with the provisions of section 171) of the last male *bhumidhar sirdar* or *asami*

(2) in sub section (2)—

(*a*) *for* the words widow mother step mother father s mother daughter sister or step sister the words widow widow of a male lineal descendant in the male line of descent mother daughter father s mother son s daughter sister or half sister being the daughter of the same father as the deceased shall be *substituted*

(*b*) for clause (*b*) the following shall be *substituted*—

(*b*) dies abandons or surrenders and in the case of a widow widow of a male lineal descendant in the male line of descent mother father's mother marries such *bhumidhar* or *sirdar* on the date immediately before the said date held the holding otherwise than as an intermediary or tenant referred to in clause (*a*) the holding shall devolve upon the nearest surviving heir (such heir being ascertained in accordance with the provisions of section 171) of the last male tenant

31 *After* section 172 of the Principal Act the following shall be *added* as new section 172 A — Insertion of a new Section 172 A in U P Act I of 1951

172 A Where a *sirdar* or *adhivasi* who has inherited any interest in any holding as a widow widow of a male lineal descendant in the male line of descent mother daughter father's mother son's daughter sister or half sister being the daughter of the same father as the deceased acquires the rights of a *bhumidhar* in such land under section 134 or 285 the rights so acquired shall for the purposes of devolution under section 172 be deemed to be accession to the holding of the last male holder thereof

32 Section 178 of the Principal Act shall be *deleted* — Deletion of Section 178 of U P Act I of 1951

33 For sub clause (1) of section 178 of the Principal Act the following shall be *substituted* — Amendment of Section 178 of U P Act I of 1951

(1) Except as provided in sub section (3) whenever in a suit for partition a court finds that the aggregate area of the holding or holdings to be partitioned does not exceed three and one eighth acres the court shall instead of proceeding to divide the holding or holdings direct the sale of same and distribution of proceeds thereof in accordance with such principles as may be prescribed

34 *After* section 182 of the Principal Act the following shall be *added* as new sections 182 A and 182 B — Insertion of new Sections 182 A and 182 B in U P Act I of 1951

182 A The provisions of section 54 and Order XX Rule 18 Code of Civil Procedure 1908 shall apply to a suit for partition of a holding under section 176

182 B Except as provided in sections 178 to 182 the partition of a holding or the separation of the share therein of a *bhumidhar* or *sirdar* shall be made by the Collector in accordance with the principles that may be prescribed

Insertion of a new Section 187 A in U P Act I of 1951

35 *After* section 187 of the Principal Act the following shall be *added* as a new section 187 A—

187 A (1) When the Collector has reasons to believe upon information or otherwise that any land the area whereof exceeds twelve and a half acres or such higher limit as may be prescribed for any district included in the holding of a *bhumidhar* or *sirdar* has not been used for three consecutive years immediately preceding for a purpose connected with agriculture horticulture or animal husbandry which includes pisciculture and poultry farming he may unless a declaration under section 143 has been obtained in respect thereto require the *bhumidhar* or *sirdar* thereof to show cause why the land be not let out for purposes of agriculture to any person

(2) The notice under sub section (1) shall state the grounds for believing that the land has not been used as referred to above the period for which it is proposed to let it out to an *asami* and such particulars as may in his opinion be necessary for the information of the *bhumidhar* or *sirdar* concerned

(3) If the *bhumidhar* or the *sirdar* appears and satisfies the Collector—

(*a*) that the land was used for a purpose connected with agriculture horticulture or animal husbandry which includes pisciculture and poultry farming within the period mentioned in sub-section (1)

(*b*) that he had sufficient cause for not so using it or

(*c*) that he shall within six months next following the date of service of the notice mentioned in sub section (1) use the land for a purpose connected with agriculture horticulture or animal husbandry which includes pisciculture and poultry farming or obtain a declaration under section 143

he shall in cases mentioned in clauses (*a*) and (*b*) discharge the notice forthwith and in case of (*c*) postpone the order to a date six months after the date of service of said notice

(4) On the date fixed under sub section (3) or any other date on which the case may be taken up the Collector shall if the land has been used for a purpose as aforesaid discharge the notice or unless for reasons to be recorded he allows further time let out the land to an *asami* in the manner and upon terms to be prescribed and all the provisions

of this Act relating to an *asami* belonging to the class mentioned in clause (*b*) of section 138 shall apply to such *asami* as if he had been admitted to the land by the *bhumidhar* or *sirdar* personally

(5) If the *bhumidhar* or *sirdar* does not appear in reply to the notice under sub section (1) and the Collector is after such further enquiries as he may consider necessary satisfied that the *bhumidhar* or *sirdar* has failed to use the land as aforesaid during the period referred to in sub section (1) he shall unless he decides to discharge the notice let out the land to an *asami* in the manner and upon terms to be prescribed and all the provisions of this Act relating to an *asami* belonging to class mentioned in clause (*b*) of section 138 shall apply to such *asami* as if he had been admitted to the land by the *bhumidhar* or *sirdar* personally

(6) It shall be lawful for the Collector instead of himself letting out the land to direct the Land Management Committee to do so

(7) An appeal against the orders of the Collector under sub section (4) or (5) directing the land to be let to an *asami* shall lie to the Commissioner

36 In section 198 of the Principal Act—

Amendment of Section 198 of U P Act I of 1951

(1) in sub section (1)—

(*a*) the word and figures or 237 shall be *deleted*,

(*b*) before clause (*a*) the following shall be *added* as a new clause (1*a*)—

(1*a*) a recognised Educational Institution for a purpose connected with instruction in agriculture horticulture or animal husbandry

(2) in sub section (1) the following shall be *added* as an Explanation—

Explanation—A person shall be deemed to be a landless agricultural labourer if he holds land not exceeding such maximum as may be prescribed in that behalf by the State Government either generally or for any particular area

(3) for sub-section (2) the following shall be *substituted*

(2) The Sub Divisional Officer may on his own motion and shall on the application of any person aggrieved by an order of the Gaon Sabha passed under sub section (1) enquire in the manner prescribed into an allotment made under sub section (1) and if he is satisfied that the Gaon Sabha has acted with substantial irregularity or otherwise than in accordance with the provisions of this Act he may pass thereon such orders as he thinks fit

Amendment of Section 202 of U P Act I of 1951

37 In section 202 of the Principal Act—

(1) *for* clause (*b*) the following shall be *substituted*

(*b*) that he—

(i) belongs to any of the classes mentioned in clauses (*a*) (*b*) (*c*) (*e*) (*g*) or (*i*) of sub section (1) of section 21 or sub section (2) of the said section or in clause (*c*) or (*d*) of section 133 or

(ii) has acquired the rights of an *asami* under the Uttar Pradesh Land Reforms (Supplementary) Act 1952

and that he holds the land from year to year or for a period which has expired or will expire before the end of the current agricultural year " and

(2) in clause (*f*) *between* the words of and section 21 the words sub section (1) of shall be *inserted*

Amendment of Section 209 of U P Act I of 1951

38 In section 209 of the Principal Act *for* the words shall be liable to ejectment on the suit of the *bhumidhar sirdar asami* Gaon Sabha or Collector as the case may be and shall also be liable to pay damages the words shall be liable to ejectment on the suit in cases referred to in clause (*a*) above of the *bhumidhar sirdar* or *asami* concerned and in cases referred to in clause (*b*) above of the Gaon Sabha or the Collector and shall also be liable to pay damages shall be *substituted*

Amendment of section 212 of U P Act I of 1951

39 In section 212 of the Principal Act the words Collector or the shall be *deleted*

Insertion of new sections 212 A to 212 C in U P Act I of 1951

40 *After* section 212 of the Principal Act, the following shall be *inserted* as new sections 212 A to 212 C—

Summary procedure for ejectment from land of public utility

212 A (1) Without prejudice to the provisions of section 212 the chairman member or secretary of a committee referred to in section 121 may make an application to the Collector for ejectment from the land of the person in possession of the land referred to in section 212

(2) The application under sub section (1) shall be, in addition to and not in derogation of the right of suit conferred by the said section and shall contain the particulars to be prescribed

(3) If the Collector is satisfied from the particulars contained in the application and after considering the statement on oath of the applicant that there is sufficient ground for proceeding he shall make an order in writing stating the grounds of his being so satisfied and requiring the person against whom the application is directed to appear within a time to be fixed by him and to show cause why an order of ejectment be not made against him

(4) Where the person does not appear in pursuance of the notice under sub section (3) or if he appears but does not contest the notice the Collector may make an order for his ejectment from the land

(5) If the person appears, in pursuance of the notice under sub section (3) and files any objection the Collector shall proceed to hear the applicant and the objector and any evidence which they may adduce

(6) Whereupon the said hearing the Collector is satisfied that the person was admitted as a tenure holder or grove holder of land referred to in section 212 or being an intermediary brought such land under his own cultivation or planted a grove there on on or after the eighth day of August 1946 he shall pass an order for ejectment of the person from the land on payment of such compensation as may be prescribed

(7) Where an order for ejectment has been passed under this section the party against whom the order has been passed may institute a suit to establish the right claimed by it but subject to the results of such suit the order passed under sub section (4) or (6) shall be conclusive

Remedies for wrongful ejectment

212 B (1) An *asami* ejected from or prevented from obtaining possession of any land forming part of his holding otherwise than in accordance with the provisions of the law for the time being in force by—

(a) his land holder or any person claiming as land holder to have a right to eject him, or

(b) any person admitted to or allowed to retain possession of the land by such land holder or person whether as an *adhiwasi*, *asami* or otherwise may sue the person so ejecting him or keeping him out of possession,

(i) for possession of the land and

(ii) for compensation for wrongful dispossession

Provided that no decree for possession shall be passed where the plaintiff at the time of the passing of the decree is liable to ejectment in accordance with the provisions of this Act within the current agricultural year

(2) When a decree is passed for compensation for wrongful dispossession but not for possession the compensation awarded shall be for the whole period during which the *asami* was entitled to remain in possession

(3) An *asami* who has sued for possession only shall not be entitled to institute a separate suit for compensation for wrongful dispossession

Explanation—For purposes of this section land does not include any area for the time being used for a purpose other than agriculture

Land holder to be impleded as defendant

212 C Where an *asami* sues under clause (*b*) of sub section (1) of section 212 B any person admitted or allowed to retain possession the land holder or the person claiming as land holder of such person shall be impleaded as a defendant

Amendment of Section 215 of U P Act 1 of 1951

41 In sub section (3) of section 215 of the Principal Act *for* the words at hundred and thirty three and one third per cent of the hereditary rates applicable to the land the words at twice the amount calculated at hereditary rates applicable to the land shall be *substituted*

Amendment of Section 222 of U P Act 1 of 1951

42 *For* sub section (4) of section 222 of the Principal Act the following shall be *substituted*

(4) If the court fee has been duly paid the court shall subject to the provisions of section 332 proceed to hear and decide the application as if it were a suit for recovery of arrears of rent

Amendment of Section 229 of U P Act 1 of 1951

43 In section 229 of the Principal Act *for* the word plaintiff the words Gaon Sabha shall be *substituted*

Insertion of new Sections 229 A to 229 D in U P Act 1 of 1951

44 *After* section 229 of the Principal Act the following shall be *added* as new sections 229 A—229 D

Trespass on a holding

229 A Where any person against whom a decree or order of ejectment from a holding or any portion thereof has been executed under the provisions of this Act or the U P Tenancy Act 1939 re enters or attempts to re enter otherwise than under or in accordance with the provisions of law upon such holding he shall be presumed to have done so with the intent to intimidate or annoy the person in possession within the meaning of section 441 of the Indian Penal Code

Suit by an *asami* for declaration of rights

229 B (1) Any person claiming to be an *asami* either exclusively or jointly with any other such person may sue the land holder for a declaration that he is an *asami* or for a declaration of his share as joint *asami* in the holding as the case may be

(2) In any suit under this section any person claiming to hold as an *asami* through the land holder shall be joined as a party

Suit for declaration of rights of a person claiming to be an *asami*

229 C A *Gaon Sabha* or a *bhumidhar* or *sirdar* of any land may sue any person claiming to be an *asami* of such land for a declaration of the rights of such person

Provision for injunction

229 D If in the course of a suit under the provisions of sections 229 B and 229 C it is proved by an affidavit or otherwise—

(a) that any property trees or crops standing on the land in dispute is in danger of being wasted, damaged or alienated by any party to the suit, or

(b) that any party to the suit threatens or intends to remove or dispose of the said property trees or crops in order to defeat the ends of justice the Court may grant a temporary injunction and where necessary also appoint a receiver

Amendment of Section 230 of U P Act I of 1951

45 In sub section (2) of section 230 of the Principal Act the following shall be *inserted* as new clauses (gg) and (ggg) after clause (g)—

(gg) the valuation of the holding and the manner of separation of the portion to be allotted to each party and of valuation thereof under section 182 B

(ggg) The making of objections and the procedure to be followed in the hearing and disposal of objections under section 182 B

Amendment of Section 231 of U P Act I of 1951

46 In sub section (1) of section 231 of the Principal Act *for* the word and figures sections 233 234 and 237 the word and figures sections 233 and 234 shall be *substituted*

Amendment of Section 232 of U P Act I 1951

47 In section 232 of the Principal Act—

(1) In sub section (1) *for* the words eighteen months the words thirty months shall be *substituted*, and

(2) *After* sub section (4) the following shall be *inserted* as new sub sections (5) and (6)

(5) Where any improvement as defined in the U P Tenancy Act 1939 was lawfully made before the date of vesting by any person on the land and such person is dispossessed from such land under sub section (1) the Assistant Collector shall at the time of making the order under sub section (4) direct compensation to be paid to such person for such improvements and the amount of compensation shall be determined as far as may be in the manner and in accordance with the principles laid down in that behalf in Chapter V of the U P Tenancy Act 1939

(6) The order for possession under sub section (4) shall be conditional on the payment by the *adhivasi* within such time as the Assistant Collector may fix for the amount of compensation to be paid under sub-section (5)

Insertion of a new Section 232 A in U P Act I of 1951

48 *After* section 232 of the Principal Act the following shall be *added* as a new section 232 A

Right of an *adhivasi* for ejectment under section 209

232 A The provisions of section 209 shall *mutatis mutandis* apply to an *adhivasi* as if he were an *asami*

Amendment of Section 233 of U P Act I of 1951

49 In section 233 of the Principal Act *for* the words an amount equal to one hundred and thirty three and one third percentum of the rent computed at hereditary rates applicable to the land the words an amount determined in the manner prescribed which shall not be less than 133 1/3 percentum and more than 200 percentum of the rent computed at hereditary rates applicable to the land shall be *substituted*

Amendment of Section 233-A of U P Act I of 1951

50 In section 233 A of the Principal Act *for* the words commute the rent to fixed money rent not exceeding 133 1/3 per cent of the rent calculated at hereditary rates the words commute the rent having regard to the matters to be prescribed to an amount of fixed money rent which shall not be less than 133 1/3 per cent and more than 200 per cent of the rent calculated at hereditary rates shall be *substituted*

Amendment of Section 234 of U P Act I of 1951

51 In section 234 of the Principal Act the words without prejudice to the provisions of section 237 shall be *deleted*

Insertion of a new Section 234-A in U P Act I of 1951

52 *After* section 234 of the Principal Act the following shall be *inserted* as a new section 234-A—

Application of sections 212 B 212 C and 229 B to 229 D in the case of an *adhivasi*

234-A The provisions of sections 212 B 212 C and 229 B to 229 D shall apply to an *adhivasi* as if he were an *asami*

Deletion of Section 237 of U P Act I of 1951

53 Section 237 of the Principal Act shall be *deleted*

Amendment of Section 240 of U P Act I of 1951

54 In sub section (2) of section 240 of the Principal Act clauses (*a*) to (*d*) shall be *deleted*

Insertion of a new Chapter IX A in U P Act I of 1951

55 After Chapter IX of the Principal Act the following shall be *inserted* as a new Chapter IX A—

CHAPTER IX A

Conferment of sirdari rights on *Adhivasi*

Acquisition of rights title and interest of land holder in the land held by *adhivasi*

210 A (1) As soon as may be after the commencement of the U P Land Reforms (Amendment) Act 1954 the State Government may by notification published in the official *Gazette*, declare that as from a date to be specified therein the rights, title and interest of the land holder in the land which on the date immediately preceding the said date was held or deemed to be held by an *adhivasi* shall as from the beginning of the date so specified (hereinafter called the appointed date) shall cease and vest except as hereinafter provided in the State free from all encumbrances

(2) It shall be lawful for the State Government if it so considers necessary to issue from time to time the notification referred to in sub section (1) in respect only of such area or areas as may be specified and all the provisions of sub section (1) shall be applicable to and in the case of every such notification

Consequences of acquisition of right title and interests under Section 240 A

240 B Where a notification under section 240 A has been published in the official *Gazette* then notwithstanding anything contained in Chapter II and IX of this Act but save as otherwise provided the following consequences shall ensue in the area to which the notification relates, namely—

(*a*) every person who on the date immediately preceding the appointed date was or has been deemed to be an *adhivasi* shall with effect from the appointed date become *sirdar* of the land referred to in section 240 A and held by him as such and shall have all the rights and be subject to all the liabilities conferred and imposed upon *sirdars* by or under this Act

(*b*) (*i*) all rents payable by the *adhivasi* in respect of the land referred to in section 240 A for any period after the appointed date which but for acquisition of rights title and interest of the land holder therein under the said section would be payable to the land holder shall vest in and be payable to the State Government and not to the land holder and payment made in contravention of this clause shall not be valid discharge of the person liable to pay the same

(*ii*) where under an agreement or contract made before the appointed date any rent for any period after the said date has been paid to or compounded or released by the land holder the same shall notwithstanding the agreement or the contract be recoverable by the State Government from the land holder and may without prejudice to any other mode of recovery be realised by deducting the amount from the compensation money payable to such land holder under section 240 L

(*c*) all arrears of revenue in respect of the land referred to in section 240 A and due from the land holder for any period prior to the appointed date shall continue to be recoverable from such land holder

(*d*) the rights title and interest of the land holder so acquired in the land shall not be liable to attachment or sale in execution of any decree or

other process of any court civil or revenue and any attachment existing at the appointed date or any order for attachment passed before such date shall subject to the provisions of section 73 of the Transfer of Property Act 1882 cease to be in force

(e) no claim or liability enforceable or incurred before the appointed date by or against the land holder for any money which is charged on or is secured by a mortgage on the land referred to in section 240 A shall except as provided in section 73 of the Transfer of Property Act 1882 be enforceable against such land or the *adhivasi* who becomes a *sirdar* under clause (a)

(f) nothing contained in this chapter shall in any way affect the right of any person—

(a) to continue to work any mines comprised in any land referred to in section 240-A which shall be governed by law for the time being in force and

(b) to recover any arrears of rent or other dues which accrued before the appointed date and the same shall notwithstanding anything contained in this Act be recoverable as heretofore by the person entitled thereto and

(g) all suits and proceedings of the nature to be prescribed pending in any court at the appointed date and all proceedings upon any decree or order passed in any such suit or proceeding previous to the appointed date shall be stayed

Provided that no decree for an arrear of rent or order for ejectment in default of an arrear of rent shall be executed by ejectment of the judgment debtor from his holding

Landholder entitled to receive compensation

240 C Every land holder whose rights title or interest in the land referred to in section 240 A are acquired under the said section shall be entitled to receive and be paid compensation as hereinafter provided

Compensation Statement

240 D. For purposes of assessment and payment of compensation for acquisition of rights title and interest of the land holder in the land referred to in section 240 A the Compensation Officer shall prepare a compensation statement showing—

(a) the name or names of the land holder

(b) where the land referred to in section 240-A was on the date immediately preceding the date of vesting

(i) recorded as *sir khudkasht* or fixed rate tenancy of the land holder or

(ii) included in the holding of a person belonging to any of the classes mentioned in clause (*d*) of section 18 or

(iii) included in the holding of a person belonging to any of the classes mentioned in section 19

the rent computed at hereditary rates applicable on the said date

(*c*) where the land referred to in section 240-A was land other than land mentioned in clause (*b*) the rent payable for such land by the tenant thereof on the said date and

(*d*) such other particulars as may be prescribed

Compensation to the landholder of an *adhivasi*

240 E The amount payable as compensation to the land holder under section 240 C shall—

(1) where such land holder or his predecessor in interest was a *bhumidhar* referred to in clause (*a*) of sub section (1) of section 18 be—

(*a*) an amount equal to ten times the rent referred to in clause (*b*) of section 240 D *plus*

(*b*) the compensation and the rehabilitation grant if any payble to him in accordance with the provisions of Chapters III to V,

(2) where such land holder was on the date immediately preceding the date of vesting, a fixed rate tenant or a person referred to in sub clause (ii) of clause (*b*) of section 240 D, an amount equal to twenty times the rent referred to in clause (*b*) of the said section

(3) where such land holder was on the date immediately preceding the appointed date, a *bhumidhar* other than a *bhumidhar* referred to in clauses (1) and (2), an amount equal to—

(*a*) ten times the rent referred to in clause (*b*) of section 240 D and

(*b*) ten times the rent referred to in clause (*c*) of the said section,

(4) where such land holder or his predecessor in interest was on the date immediately preceding the appointed date a person referred to in sub-clause (iii) of clause (*b*) of section 240-D, an amount equal to ten times the rent referred to in clause (*b*) of section 240 D

Provided always that where the amount to be paid under sub clause (a) of clause (3) or clause (4) is less than the amount equal to five times the rent payable for such land by the tenant thereof on the date immediately preceding the date of vesting, the amount to be paid shall be equal to five times the said rent

Preliminary Publication of Statement

240 F The Compensation Statement prepared under section 240-D shall be published in the manner prescribed and a copy thereof shall also be sent to the land holder concerned

Filing of objections

240 G Any person interested or the State Government may in the manner prescribed file before the Compensation Officer an objection upon such statement within the period of one month from the date of its publication

Disposal of objections

240 H (1) Except as provided in sub-section (2) the Compensation Officer shall after hearing the parties if necessary on the objections filed under section 240 G dispose of the objections in the manner prescribed

(2) Where the objection filed under sub section (1)—

(a) is that the land is not land referred to in sub-section (1) of section 240 A the Compensation Officer shall frame an issue to that effect and refer it for disposal to the Court which would have jurisdiction to decide a suit under section 229 B read with section 234-A in respect of the land and thereupon all the provisions relating to the hearing and disposal of such suits shall apply to the reference as if it were suit,

(b) involves a question of title and such question has not already been determined by a competent Court the Compensation Officer shall refer the question for determination to the District Judge

Explanation—Whether a person is or is not an *adhwan* shall not be deemed to raise a question of title within the meaning of this clause

(3) The District Judge shall determine the question referred to him under clause (b) of sub section (2) in the manner prescribed and his decision thereon shall be final

Appeal to the Collector

240 I Notwithstanding anything contained in any law any person aggrieved by the order of the Compensation Officer deciding the objection in so far as it relates to the amount of compensation under section 240 H, may appeal to the Collector who shall decide the appeal in the manner prescribed and the decision of the Collector shall be final

Final publication of the statement

240 J (1) Where no objection has been filed in regard to the compensation statement published in pursuance of section 240 F or where such objections are filed and have been finally disposed of the statement shall where necessary be amended altered or modified The Compensation Officer shall sign the statement and affix his seal thereto

(2) The statement so signed and sealed shall become final

(3) A copy of the final statement shall be supplied free of charge to the land holder concerned

Payment of Compensation

240 K (1) Except as provided in sub section (3) the Compensation mentioned in the final compensation statement referred to in section 240 J shall be paid in cash in one lump sum or in annual instalments—

(a) not exceeding ten in cases referred to in sub sections (2) and (3) of section 240 E and

(b) not exceeding five in cases referred to in sub sections (1) and (4) of section 240 E

as may be prescribed

Provided however that where compensation is prescribed to be paid in instalments there shall be paid over and above the amount of compensation a sum equal to six and one quarter per cent thereof

(2) The Compensation shall be paid to the land holder whose name is entered in the final compensation statement and where the land holder dies before it is paid to him it shall be paid to his legal representatives

(3) The compensation and rehabilitation grant payable in pursuance of clause (b) of sub section (1) of section 240 E shall be paid in accordance with the provisions of Chapters IV and V

Provision of this Chapter not to apply to evacuee property

240 L Nothing contained in this chapter shall apply to evacuee property

Power to make rules.

240 M (1) The State Government may make the rules for the purpose of carrying into effect the provisions of this chapter

(2) Without prejudice to the generality of the foregoing power such rules may provide for—

(a) the method of calculating rents and other dues mentioned in clauses (b) and (c) of section 240-B ,

(b) the disposal of suits and proceedings stayed under this Chapter ,

(c) the form and the manner in which the compensation statement under section 240 E shall be prepared

(d) the manner in which the Compensation Officer shall refer the objections to competent Court or the District Judge under section 240-H

(e) the principles to be followed in determining the hereditary rates in areas where such rates are not already determined

(f) the time within which applications may be presented under this Act in cases for which no specific provision in that behalf has been made herein

(g) the application of the provision of the Indian Limitation Act 1908 to applications and proceedings under this Act

(h) the fees to be paid in respect of applications under this Act in cases in which no specific provision in that behalf has been made herein

(i) the duties of any officer or authority having jurisdiction under this Act the procedure to be followed by such officer or authority

(j) the transfer of proceedings from one authority or officer to another officer or authority

(k) the procedure to be followed in application and other proceedings under this Act in cases in which no specific provision has been made herein and

(l) the matters which are to be or may be prescribed

Amendment of Section 246 of U P Act 1 of 1951

56 In section 216 of the Principal Act—

(a) in sub section (1)—

(1) in clause (a) for the words said date the words date of vesting shall be *substituted*

(2) the proviso at the end of clause (c) shall be transferred to and be read as proviso to clause (a) and

(3) *after* clause (a) the following shall be *added* as a new clause *(aa)*

(aa) where he becomes a *sirdar* under section 240 B an amount which shall be equal to the rent payable or deemed to be payable by him on the date immediately preceding the appointed date

(b) *after* sub section (2) the following shall be *inserted* as new sub section (3)—

(3) where the land revenue payable by a *sirdar* under clauses (a) and (aa) of sub section (1) exceeds the amount computed at double the hereditary rates applicable the Assistant Collector incharge of the

Sub Division may on his own motion and shall on the application of the *sirdar* order abatement of land revenue to an amount so computed

57 In section 247 of the Principal Act—

(1) *after* the figures 246 the words but subject to the proviso to clause (*a*) of sub section (1) of the said section shall be *inserted* and

Amendment of Section 247 of U P Act I of 1951

(2) at the end the following shall be *added* as a proviso

Provided that the Collector may in any case where the land to which the *sirdar* was admitted was such as has not been cultivated for a period exceeding three years continuously immediately before the date of admission direct having regard to the nature and class of land that the land revenue payable therefor during a period not exceeding seven years from the date of vesting be at such reduced amount whether on a graduated scale or otherwise as he may fix

58 In section 247 A of the Principal Act, *for* the words rent occurring between the words the and plus the word land shall be *substituted*

Amendment of Section 247 A of U P Act I of 1951

59 *After* sub section (2) of section 268 of the Principal Act the following shall be *added* as sub section (3)

Amendment of Section 268 of U P Act I of 1951

(3) The State Government may likewise remit or suspend for any period the rent payable by an *asami* to a Gaon Samaj

60 In sub section (2) of section 294 of the Principal Act, *after* clause (*a*) the following shall be *added* as a new clause (*aa*)—

Amendment of Section 294 of U P Act I of 1951

(*aa*) the principles to be followed for determination of land revenue under the proviso to Section 247

61 (1) The existing section 305 of the Principal Act shall be *re numbered* as sub section (1) of section 305

Amendment of Section 305 of U P Act I of 1951

(2) In sub section (1) of section 305 as re numbered for the words on such principles the words as may be determined in accordance with sub section (2) shall be *substituted* and

(3) *after* sub section (1) as re numbered the following shall be *added* as a new sub section (2)

(2) The amount of compensation in case of *bhumidhars* shall be thirty five times of the valuation of hereditary rates or seventy times the land revenue payable by them whichever is greater and in case of *sirdars* fifteen times of such valuation *plus* such compensation for improvement and trees as may be agreed upon by the applicant and members of the farm and in the event of disagreement as fixed by the Collector

Provided that where the land revenue paid by the *bhumidhar* or *sirdar* is less than the valuation at hereditary rates an addition of an amount equal to 10 times the difference between the valuation and the land revenue in case of *bhumidhars* and 5 times such difference in the case of *sirdars* shall be made to the compensation

Amendment of section 314 of U P Act I of 1951

62 In sub section (4) of section 314 of the Principal Act for the word may occurring between the words he and direct the word shall shall be *substituted*

Insertion of a new section 332 A

63 *After* section 332 of the Principal Act the following shall be and be deemed to have been *inserted* as and with effect from the commencement of the Uttar Pradesh Zamindari Abolition and Land Reforms (Amendment) Ordinance 1954 as a new section 332 A

Adhivasi or *asami* right to land not a question of title

332 A Where in any suit or proceeding relating to land under this Act or under any other law for the time being in force a question is raised whether a person is or is not an *adhivasi* or *asami* of any land it shall not be deemed to raise a question of title

Insertion of a new section 332 B in U P Act I of 1951

64 *After* section 332 A as hereinafter *inserted*, the following shall be *added* as a new section 332 B in the Principal Act—

Procedure when plea of *asami* or *adhivasi* rights is raised in a Civil Court

332 B (1) If in any suit relating to land instituted after the commencement of the U P Land Reforms (Amendment) Act 1954 in a civil court or if instituted before the said commencement a decree had not already been passed the question arises or is raised whether any party to the suit is an *adhivasi* or *asami* of the land and such question has not previously been determined by a court of competent jurisdiction the Civil Court shall frame an issue on the question and submit the record to the Collector for the decision of that issue only

Explanation—A plea of being an *adhivasi* or *asami* which is clearly untenable and intended only to oust the jurisdiction of the Civil Court shall not be deemed to raise a question as aforesaid

(2) The Collector after reframing the issue if necessary shall decide such issue only and return the record together with his finding thereon to the Civil Court which submitted it

(3) The Collector may instead of deciding the issue himself transfer it to a competent subordinate revenue court which shall after reframing the same if necessary decide it and return the record with its finding thereon through the Collector to the Civil Court

(4) The Civil Court shall then proceed to decide the suit accepting the finding of the Collector or the subordinate revenue court on the issue referred to it

(5) The finding of the Collector or subordinate revenue court on the issues referred to it shall for the purposes of appeal be deemed to be part of the finding of the Civil Court

Amendment of section 337 of U P Act I of 1951

65 *For* the existing section 337 of the Principal Act the following shall be *substituted*

337 For the purposes of computing the area fixed under any of the provisions of this Act 2 acres shall count as 1 acre in the following areas

(*a*) Bundelkhand

(*b*) Trans Jamuna portions of the Allahabad Etawah Agra and Mathura Districts

(*c*) The portion of the Mirzapur District south of Kaimur Range

(*d*) Tappa Upraudh and Tappa Chauraai (Balar Pahar) of tahsil Sadar in district Mirzapur

(*e*) Portion of tahsil Robertsganj district Mirzapur which lies north of Kaimur Range and

(*f*) Parganas Sakteshgarh and the villages mentioned in lists A and B of Schedule VI in hilly parts of parganas Ahraura and Bhagwat of tahsil Chunar of district Mirzapur

Insertion of a new section 343 A in U P Act I of 1951

66 *After* section 343 of the Principal Act the following shall be *added* as a new section 343 A

State Government to be a party in suits by or against the Gaon Samaj or local authority

343 A Notwithstanding anything in any law if the State Government so prescribes it shall be made a party in any suit or class of suits instituted by or against the Gaon Samaj or local authority under this Act relating to land and other things vested in it under section 117 or 117 A

Amendment of section 344 of U P Act I of 1951

67 In sub section (1) of section 344 of the Principal Act—

(*a*) in clause (*d*) between the words which and applications the word suits shall be *inserted*

(*b*) in clause (*e*) between the words of and appeal the word suits shall be *inserted* and

(*c*) in clause (*f*) between the words to and applications the word suits shall be *inserted*

Amendment of Schedule II of U P Act I of 1951

68 In Schedule II of the Principal Act—

(a) in the entry at serial no 6 A in column 4 *after* the words Assistant Collector the words First Class shall be *added*

(b) after the entry serial no 11 the following shall be *added* as new entry at serial no 11 A

1	2	3	4	5	6
11 A	212 B	Suit for possession of the land or for compensation for wrongful dispossession	Assistant Collector First Class	Commissioner	Board

(c) in the entry against serial no 14 in column 4 for the word Ditto the words Assistant Collector incharge of a sub division shall be *substituted*, and

(d) after the entry at serial no 15 the following shall be *added* as new entry 15 A

1	2	3	4	5	6
15 A	222 (4) and (5)	Suit for recovery of arrears of rent	Tahsildar	Commissioner	Board

(e) After entry at serial no 16 the following shall be *added* as new entries at serial nos A 16 and B 16

1	2	3	4	5	6
A 16	229 B	Suit by *asami* for declaration of rights	Assistant Collector First Class	Commissioner	Board
B 16	229 C	Suit for declaration of rights of a person claiming to be *asami*	Assistant Collector First Class	Commissioner	Board

(f) in the entry against serial no 18 in column 2 the letters brackets and words (b) and (c) shall be *deleted*

Insertion of Schedules V and VI in the U P Act I of 1951

69 *After* Schedule IV of the Principal Act the following shall be *added* as new Schedules V and VI

SCHEDULE V

(Section 26 B)

Amendments of the Act in its application to evacuee property

1 Where any land was recorded as *khudkasht* of an evacuee at the time the evacuee migrated to Pakistan such land shall notwithstanding that the evacuee may not have continued subsequently to cultivate it be deemed for purposes of Chapter II to have been the *khudkasht* of the evacuee on the date immediately preceding the date of vesting

2 (1) A person who has been deemed to be a hereditary tenant under section 16 in respect of any land which is evacuee property shall within one year from the commencement of the Uttar Pradesh Land Reforms (Amendment) Act, 1954 pay to the Custodian—

(*a*) where he has become a *bhumidhar* of the land before the said commencement an amount equal to 5 times the rent of such land determined in accordance with the said section and

(*b*) where he has not become a *bhumidhar*, an amount equal to 15 times the rent so determined

(2) The amount paid under sub para (1) shall be credited by the Custodian to the account of the evacuee concerned

(3) Where the person liable to pay the amount under sub para (1) pays the same within the period allowed therefor he shall become a *bhumidhar* of the land liable to pay land revenue equal to one half of the land revenue payable by him on the date of commencement of the U P Land Reforms Act 1954

(4) If the person liable to pay the amount under sub para (1) fails to pay the amount aforesaid within the period allowed therefor he shall forfeit all his rights, title and interests in the land of which he was so deemed to be a hereditary tenant and the provisions of Chapter II of the Zamindari Abolition and Land Reforms Act 1950 shall and be deemed always to have had effect in respect of such land as if section 16 had never been enacted

(5) Where a person has been deemed under section 16 to be a hereditary tenant of a share only in any land references to land in sub paras (1) (3) and (4) shall be construed as references to such share only

(6) Any sums already paid or which may hereafter be paid by the person referred to in clause (*a*) of sub para (1) for the acquisition of *bhumidhari* rights under section 134 or under the U P Agricultural Tenants (Acquisition of Privileges) Act 1949 in respect of the land shall subject to a maximum of ten times the rent be paid by the State Government to the Custodian and the provisions of sub para (2) shall apply thereto

3 Where any lease in respect of any land in any case being evacuee property has been granted by the Custodian under or in accordance with the Administration of Evacuee Property Act 1950 the provisions relating to the leases their

cancellation and ejectment contained in the Administration of Evacuee Property Act 1950 shall have effect in respect of them any thing to the contrary contained in this Act not withstanding

4 (1) A person who has become an *adhivasi* under clause (*b*) of section 20 of any land which is evacuee property, shall within one year from the commencement of the U P Land Reforms (Amendment) Act 1954 pay the Custodian an amount equal to 20 times the rent computed at hereditary rates applicable to the land

(2) The amount paid under sub para (1) shall be credited by the Custodian to the amount of the evacuee concerned

(3) If the person liable to pay the amount under sub-para (1)—

(*a*) pays the same within the period allowed therefor he shall become a *bhumidhar* of the land liable to pay land revenue equal to one half of the rent computed at hereditary rates applicable to the land or

(*b*) fails to pay the same within the period allowed therefor he shall forfeit all his rights title and interest in the land of which he was an *adhivasi* and the provisions of Chapter II of the U P Zamindari Abolition and Land Reforms Act 1950 shall and be deemed always to have had effect in respect of such land as if clause (*b*) of section 20 had been never enacted

(4) Where a person becomes an *adhivasi* under clause (*b*) of section 20 of a share only in any land references to land in sub paras (1) and (3) shall be construed as references to such share only

5 Any person becoming an *asami* under sub section (2) of section 21 of any land being Evacuee Property shall, not withstanding anything in this Act be liable to ejectment by the Custodian in the same manner and to the same extent as a person holding under a lease from the Custodian and all the provisions of the Administration of Evacuee Property Act 1950 relating to ejectment shall apply to him accordingly

6 If in respect of any evacuee land a question arises as to whether any person in occupation thereof is or is not a *sirdar* under section 16 and 19 or is or is not an *adhivasi* under section 20 such question shall be decided by the Custodian of Evacuee Property and not by any other court or authority and the decision of the Custodian shall be conclusive subject to the provisions of appeals, review and revision contained in the Administration of Evacuee Property Act 1950

7 In the case of holding held jointly by two or more *sirdars* any one or more of them who may be allottees from the Custodian under the Administration of Evacuee Property Act 1950 may transfer the whole of his or their interest in favour of anyone or more of the remaining co-tenure holders

SCHEDULE VI

(See section 337)

LIST A

List of villages of pargana Ahraura

1	Audih	11	Kutlupur
2	Baghor	12	Lohia
3	Baghri	13	Maddhupur
4	Bantaia	14	Majhui
5	Bat	15	Mubarakpur,
6	Bhawanipur	16	Nagnar Haraiya
7	Dhotwa,	17	Parahi
8	Gaurahi	18	Sukrut
9	Khamahria	19	Takia
10	Khan Arzampur		

LIST B

List of villages of pargana Bhagwat

1	Ban Imlia	10	Nibia
2	Jargal Mahal	11	Rampur Batho,
3	Semra Barho	12	Sonbarsa
4	Khatkharia	13	Bisunpura
5	Khoradih	14	Khamhiria
6	Talar	15	Puraima
7	Chit Bisram	16	Nikerika,
8	Padarwa	17	Dhansiria
9	Hinauta	18	Garhwa

70 The U P Land Revenue Act 1901 shall in its application to an area in respect of which a notification under section 4 of the U P Zamindari Abolition and Land Reforms Act 1950 has been issued stand amended from the date of vesting thereof and it is hereby amended to the extent mentioned in column 3 of the Schedule

Amendment of U P Act III of 1901

71 In clause *(b)* of section 2 of the U P Land Reforms (Supplementary) Act 1952 *after* the words and figures section 18 or 19 the words or an *adhivasi* under section 20 shall be deemed always to have been *inserted*

Amendment of section 2 of U P Act XXXI of 1952

72 Where any decree for possession under section 9 of the Specific Relief Act 1877 has been passed in respect of any land before the date of vesting and the judgment debtor has under the provisions of the Principal Act acquired any right or title in the land he shall notwithstanding anything contained in any other law be entitled to resist execution of the decree where by virtue of such right or title he is entitled to retain possession thereof

Right to resist execution of decrees under section 9 of the Specific Relief Act 1877

Amendment of section 16 and 20 of U P Act 1 of 1951 in their application to Banaras

73 In sections 16 and 20 of the Principal Act as applicable to Banaras State as defined in the Banaras State Administration Order 1949 for the figures 1356 wherever they occur the figures 1357 shall and be deemed always to have been *substituted*

74 (1) All suits of the nature specified in items 11 A A 16 and B 16 of Schedule II of the Principal Act instituted before the commencement of this Act and all such suits pending in the court of the first instance on the date immediately preceding the said commencement shall be heard and decided by the court which but for the amendments made in the Principal Act by sections 40 and 44 of this Act would have had jurisdiction to hear and decide them

(2) All appeals revisions and other proceedings in any such suits as are referred to in sub section (1) shall notwithstanding the amendment of the Principal Act by sections 40 and 44 of this Act shall lie in and be heard and decided by the court in which such appeal revision or proceeding would have had if the said amendments had not been made

Repeal

75 The U P Zamindari Abolition and Land Reforms (Amendment) Ordinance 1954 is hereby repealed and the provisions of sections 6 and 24 of the U P General Clauses Act 1904 shall apply as if it had been an Act repealed by an U P Act

Transitory Provision

76 (1) The State Government may for the purpose of removing any difficulties particularly in relation to the transition from the provisions of the Principal Act to the provisions of that Act as amended by this Act by order direct that the Principal Act amended as aforesaid shall during the period of twelve months next after the commencement of this Act have effect subject to such adaptations whether by way of modification addition or omission as it may deem to be necessary and expedient

(2) Every order made under sub section (1) shall be laid as soon as may be before both Houses of the State Legislature

SCHEDULE

AMENDMENT TO THE U P LAND REVENUE ACT 1901

(*Section* 70)

Serial no	*Section*	*Extent of modification or amendment*
1	34	In sub-section (1) *for* the words Panchayati Adalat exercising jurisdiction in the village in which the land is situate the words Tahsildar of the Tahsil in which the land is situate shall be *substituted*
2	35	*For* section 35 the following shall be *substituted* (1) The Tahsildar on receiving a report under section 34 or upon the facts coming otherwise to his knowledge may either direct the Panchayati Adalat to make such enquiry as appears necessary or may himself make such enquiry (2) The Panchayati Adalat shall upon the receipt of the directions from the Tahsildar make enquiries in the manner prescribed and shall submit them with its report to the Tahsildar (3) Where it appears from the enquiries made under sub section (1) that— (*a*) the succession or transfer has taken place and is not disputed the Tahsildar shall direct the Annual Register to be amended accordingly or (*b*) the succession or transfer is disputed or the transfer is in contravention of the provisions of the U P Zamindari Abolition and Land Reforms Act 1950 the Tahsildar shall refer the case to the Collector who shall dispose it of after deciding the dispute in accordance with the provisions of section 40
3	210	(1) *For* clause (*b*) of sub-section (1) the following shall be *substituted*— (*b*) (i) to the Commissioner from orders passed by a Collector or an Assistant Collector First Class or Assistant Collector incharge of sub-division

(ii) to the Collector from orders passed by an Assistant Collector Second Class or Tahsildar

(2) Clause (c) of sub section (1) shall be *deleted*

(3) Sub-section (4) shall be *deleted*

213 Section 213 shall be *deleted*

214 Sub section (3) shall be *deleted*

227 *After* clause (5) the following shall be *added* as new clause (5-a)—

'(5 a) to enquire into and decide applications made under section 39

234 Clause (b) shall be *deleted*

PSUP—A. P 68 Genl (Leg)—1955—2,970

KUMAUN AGRICULTURAL LANDS (MISCELLANEOUS PROVISIONS) ACT 1954*

[U P ACT XXI OF 1954]

[*Authoritative English Text of the Kumaun Krishi Bhoomi (Prakirna Upbandh) Adhiniyam* 1954]

AN

ACT

to provide for security of tenure and to make other miscellaneous provisions relating to agricultural lands in Kumaun

WHEREAS it is expedient to provide for security of tenure and other miscellaneous provisions relating to agricultural lands in Kumaun,

It is hereby enacted as follows

Short title extent and commencement.

1 (1) This Act may be called the Kumaun Agricultural Lands (Miscellaneous Provisions) Act 1954

(2) It shall extend to the district of Tehri Garhwal and the whole of the Kumaun Division except the areas which are included in Government Estates or to which the U P Zamindari Abolition and Land Reforms Act 1950 applies.

(3) It shall come into force at once

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*For statement of Objects and Reasons please see *Uttar Pradesh Gazette (Extraordinary)* dated March 24 1954

Passed in Hindi by the Uttar Pradesh Legislative Assembly on April 21 1954 and by the Uttar Pradesh Legislative Council on September 1 1954

Received the assent of the Governor on October 18 1954 under Article 200 of the Constitution of India and was published in the *Uttar Pradesh Gazette Extraordinary* dated October 21 1954

[Published in the *Uttar Pradesh Gazette Extraordinary* dated October 21, 1954

2 In this Act unless there is anything repugnant in the subject or the context— Definitions

(a) prescribed means prescribed by rules framed under this Act

(b) State Government means the Government of Uttar Pradesh,

(c) tenant includes a *sirtan* but does not include a *khatkar* or *maurusdar* and

(d) words and expressions used but not defined in this Act shall have the meaning assigned to them in the law relating to land revenue or land tenure applicable to Kumaun

3 Notwithstanding any law custom or contract to the contrary— Ejectment of tenants

(1) no tenant shall be ejected from his holding or any portion thereof save in pursuance of an order of a competent court and

(2) no court shall order ejectment of a tenant from his holding or any portion thereof except on one or more of the following grounds namely—

(a) that a decree against him or his predecessor in interest for arrears of rent in respect of that holding on account of any agricultural year, remains unsatisfied for a period exceeding one year from the date of the decree, or

(b) that he has committed an act or omission detrimental to the land included in his holdings or inconsistent with the purposes for which it was let or

(c) that he has sub let his holdings or any part thereof in contravention of the provisions of this Act

4 When the Court makes an order for the ejectment of a tenant on the ground mentioned in clause (b) of sub section (2) of section 3 it shall further direct that if the tenant repairs the damage within three months from the date of the decree or within such further period as the Court may for reasons to be recorded allow the decree shall not be executed except in respect of costs Other directions in the order of ejectment

5 Notwithstanding anything in any law no tenant shall sub let the whole or any portion of his holding except where the lessor is— Sub-letting by tenants

(i) an unmarried woman or if married has been divorced or separated from her husband or is a widow

(ii) a minor whose father is dead,

(iii) a person prosecuting studies in a recognised institution and is not more than 25 years of age,

(iv) a lunatic or an idiot

(v) a person incapable of cultivating by reasons of blindness or other physical infirmity

(vi) in the military, naval or air service of the Union or

(vii) undergoing imprisonment for a term exceeding three months

Provided that in the case of holding held jointly by more persons than one this exception shall not apply unless all such persons are at the commencement of the lease subject to one or other of the afore said disability

Illegal dispossession

6 (1) If a landholder dispossesses a tenant from his land otherwise than in accordance with the provisions of the law in that behalf the landholder shall be presumed to have done so with the intent to annoy or intimidate such tenant within the meaning of section 441 of the Indian Penal Code

(2) Whenever a person is convicted of an offence of criminal trespass in respect of a land in the possession of a tenant and it appears to the court that the tenant has been dispossessed thereby of the land it may if it thinks fit when convicting such person or at any time within two months from the date of the conviction order the tenant dispossessed to be restored to the possession of the same

(3) The order under sub section (2) shall not prejudice any right or interest to or in any such land which any person may be able to establish in the appropriate court

(4) An order under this section may be made by any court of appeal reference or revision

Commutation of rent

7 Where the rent payable by a tenant is payable in kind or on estimate or appraisement of the standing crop or on rates varying with crops sown or partly in one of such ways and partly in another or other of such ways the Assistant Collector may on his own motion, and shall on the application of the person by or to whom the rent is payable commute the rent in the manner and at rates to be prescribed having regard to the nature of the soil

Assessment of land revenue on extensions

8 (1) Notwithstanding anything contained in the U P Land Revenue Act 1901 or any other law in that behalf the State Government may direct that land revenue be assessed on any extension made after the last settlement made previous to the commencement of this Act and thereupon land revenue shall be assessed on such land

(2) The land revenue to be assessed on the said extension shall bear the same incidence as the land of which it is the extension and shall be payable by the persons liable to pay the land revenue of the land of which it is the extension

(3) The provisions of the U P Land Revenue Act, 1901 shall so far as they are not inconsistent with the provisions of this Act apply for the purposes of assessment of land revenue under sub section (2)

Explanation—In this section the word extension has the meaning assigned to it in clause (2) of section 3 of the Kumaun Nayabad and Waste Lands Act, 1948

Rent on extension

9 Where land revenue has been assessed on an extension under section 8 and such extension is held by a tenant, the tenant shall be liable to pay rent for the extension to the landholder at the same rate at which rent is payable for the land of which it is the extension

Provided that where the rent for the extension determined in accordance with this section exceeds 125 per cent of the land revenue assessed thereon under section 8 the rent payable shall be the amount of land revenue *plus* 25 per cent thereof

Explanation For purposes of this section the expression tenant includes a *khaikar* and a *mawasidar*

Power to make rules

10 The State Government may make rules for purposes of carrying into effect the provisions of this Act

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PSUP A P 81 Genl (Leg)—1954—2 916,

THE LAND ACQUISITION (U P AMENDMENT) ACT, 1954

(U P Act No XXII of 1954)

(As passed by the U P Legislature)

An

Act

to amend the Land Acquisition Act 1894 in its application to Uttar Pradesh for certain purposes

Act I of 1894

Whereas it is expedient to amend the Land Acquisition Act, 1894 in its application to Uttar Pradesh for the purposes hereinafter appearing

Act I of 1894

It is hereby enacted as follows

Short title and commencement

1 (1) This Act may be called the Land Acquisition (U P Amendment) Act 1954

(2) It shall come into force at once

Amendment of Act I of 1894 in its application to Uttar Pradesh

2 In its application to Uttar Pradesh, the Land Acquisition Act 1894 (hereinafter referred to as the Principal Act) shall in so far as it relates to acquisitions of land except for the purposes of the Union have effect subject to the amendments specified in the schedule

Savings

3 Notwithstanding anything contained in section 2 section 23 of the Principal Acts shall in respect of any acquisition of land made in pursuance of notification under section 4 of the said Act issued prior to the commencement of this Act have effect as if sub section (2) thereof had not been omitted

SCHEDULE

(Section 2)

Amendments to the Land Acquisition Act, 1894

Amendment of section 3 of Act I of 1894

1 In section 3 of the Land Acquisition Act 1894 (hereinafter referred to as the Principal Act)—

(1) for clause (*f*) the following shall be *substituted*—

(*f*) the expression public purpose includes provision for or in connection with—

(i) sanitary improvements of any kind including reclamation

(ii) the laying out of village sites townships or the extension planned development or improvement of existing village sites or townships

(iii) the settlement of land for agriculture with the weaker section of the people and and

(2) after clause (*g*) the following shall be *added* as a new clause (*h*)—

(*b*) Land Reforms Commissioner means the Land Reforms Commissioner appointed by the State Government

Amendment of section 4 of Act I of 1894

2 In section 4 of the Principal Act—

(1) In sub section (1) after the word Government the words or Collector shall be *added* and

(2) in sub section (2) after the words such Government the words or Collector shall be *added*

Amendment of section 5 A of Act I of 1894

3 In sub section (1) of section 5 A of the Principal Act for the words thirty days the words twenty one days shall be *substituted*

Amendment of section 12 of Act I of 1894

4 In sub section (2) of section 12 of the Principal Act the following words shall be *inserted* after the word made —

and also send a copy of the award to the Land Reforms Commissioner

Insertion of a new section 12 A in Act I of 1894

5 After section 12 of the Principal Act the following shall be *added* as a new section 12 A

Correction of award

12 A (1) The Collector may at any time but not later than six months from the date of the award or where a reference has been made under section 18 before the making of such reference correct any clerical or arithmetical mistakes in the award either of its own motion or on the application of any person interested

(2) The Collector shall give immediate notice of any correction made in the award to all persons interested

(3) Where any excess amount is proved to have been paid to any person as a result of the correction made under sub-section (1) such person shall be liable to refund the excess and if he defaults or refuses to pay the same may be realised as an arrear of land revenue

Amendment of section 17 of Act I of 1894

6 After sub section (1) of section 17 of the Principal Act the following shall be inserted as a new sub-section (1 A)

(1 A) The power to take possession under sub section (1) may also be exercised in the case of other than waste or arable land, where the land is acquired for or in connection with sanitary improvements of any kind or planned development

Amendment of section 18 of Act I of 1894

7 In section 18 of the Principal Act after sub section (2) the following shall be *added* as new sub sections (3) and (4)

(3) Without prejudice to the provisions of sub section (1) the Land Reforms Commissioner may where he considers the amount of compensation allowed by the award under section 11 to be excessive require the Collector that the matter be referred by him to the Court for determination of the amount of compensation

Explanation—In any case of land under Chapter VII the requisition under this sub section may be made by the Land Reforms Commissioner at the request of the Company on its undertaking to pay all the cost consequent upon such requisition

(3) The requisition shall state the grounds on which objection to the award is taken and shall be made within six months from the date of the award.

Amendment of section 23 of Act I of 1894.

8. In section 23 of the Principal Act—

(1) In clause first the following shall be *added* as an explanation at the end:

Explanation—In judging the market value aforesaid in any case where land is required for or in connection with sanitary improvements of any kind or planned development due regard shall be had to the insanitary and unhygienic conditions of the land on the date aforesaid.

(2) Sub-section (2) shall be *deleted*.

Amendment of section 25 of Act I of 1894.

9. In section 25 of the Principal Act the words "or be less than the amount awarded by the Collector under section 11" shall be *deleted*.

Amendment of section 30 of Act I of 1894.

10. (1) The existing section 30 of the Principal Act shall be renumbered as sub-section (1) and the following shall be *added* as a new sub-section (2):

(2) In cases of acquisition of land for a society registered under the Societies Registration Act 1860 sub-section (1) shall have effect as if for the words and figures "sections 6 to 37 (both inclusive)" the words and figures "sections 6 and 7" had been *substituted*.

THE U. P. LEGISLATURE MEMBERS (NATIONAL PLAN LOAN) (PREVENTION OF DISQUALIFICATION) ACT 1954*

(U. P. ACT No. XXIII OF 1954)

[*Authoritative English Text of the Uttar Pradesh Vidhan Mandal Sadasya (Rashtriya Niyojan Riss) (Anashola Niwesan) Adhiniyam*, 1954.†

AN

ACT

to enable members of Uttar Pradesh Legislature to take their due share in the achievements of success of National Plan Loan Scheme, and also to provide against incurring by them by so partaking the disqualification under sub clause (a) of clause (1) of article 191 of the Constitution

WHEREAS the Central Government has introduced a scheme for the issue of National Savings Certificate for the purpose of financing projects for the development of the Country

*For Statement of Objects and Reasons please see *U. P. Gazette (Extraordinary)* dated September 15, 1954.

Passed in Hindi by the Uttar Pradesh Legislative Council on September 21, 1954 and by the Uttar Pradesh Legislative Assembly on October 21, 1954.

Received the assent of the Governor on November 23, 1954 under Article 200 of the Constitution of India and was published in the *Uttar Pradesh Gazette Extraordinary* dated November 26, 1954.

†Published in the *Uttar Pradesh Gazette Extraordinary* dated November 26, 1954.

AND WHEREAS with a view to enable members of Uttar Pradesh Legislature to take their due share in the achievement of this National objective it is necessary immediately to provide against incurring by them by so partaking the disqualification under sub clause (*a*) of clause (1) of article 191 of the Constitution

It is hereby enacted in the Fifth year of the Republic of India as follows

Short title and commencement

1 (1) This Act may be called the U P Legislature Members (National Plan Loan) (Prevention of Disqualification) Act 1954

(2) It shall come into force atonce

Definitions

2 In this Act unless the subject or context otherwise requires—

(*a*) Government Security has the meaning assigned to it in the Indian Securities Act 1920

(*b*) National Plan Certificate includes—

(i) 12 years National Saving Certificate

(ii) 10 years National Plan Certificate and

(iii) any other savings certificate or Government security notified in that behalf by the State Government and

(*c*) 'State Government means the Government of Uttar Pradesh

Prevention of disqualification for membership of the State Legislature

3 It is hereby declared that a person shall not be and shall be deemed never to have been disqualified for being chosen as and for being a member of the Uttar Pradesh Legislative Assembly or the Uttar Pradesh Legislative Council by reason that he is agent or holds other like office under the Government of India or the Government of Uttar Pradesh for the purpose of effecting sales of or collecting subscriptions towards National Plan Certificates for such commission as the Government of India may have fixed in that behalf or without such commission

UP A P 96 Genl (Leg)—1954—2 916

THE U P CIVIL LAWS (REFORMS AND AMENDMENT) ACT, 1954

(U P Act No XXIV of 1954)

[AUTHORITATIVE ENGLISH TEXT OF THE UTTAR PRADESH CIVIL LAWS (SUDHAR TATHA SANSHODHAN) ADHINIYAM, 1954]

AN

ACT

to provide for reforming the Civil Laws

WHEREAS it is expedient to reform the Civil Laws and to that end in view to amend certain Acts in their application to Uttar Pradesh

It is hereby enacted as follows

Short title and commencement

1 (1) This Act may be called the Uttar Pradesh Civil Laws (Reforms and Amendment) Act, 1954

(2) It shall come into force at once

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*For statement of Object and Reasons please see *Uttar Pradesh Gazette Extraordinary* dated December 12, 1953

Passed in Hindi by the Uttar Pradesh Legislative Assembly on April 26 1954 and by the Uttar Pradesh Legislative Council on September 3 1954

Received the assent of the President on November 22 1954 under Article 201 of the Constitution of India and was published in the *Uttar Pradesh Gazette Extraordinary* dated November 30 1954

†Published in the *Uttar Pradesh Gazette Extraordinary* dated November 30 1954

2 The enactments specified in column 2 of the Schedule shall, in their application to Uttar Pradesh, be and they hereby are amended to the extent mentioned in columns 3 and 4 thereof

Amendment of enactments specified in the Schedule

3 (1) Any amendment made by this Act shall not affect the validity, invalidity, effect or consequence of anything already done or suffered, or any right, title, obligation or liability already acquired, accrued or incurred or any release or discharge of or from any debt, decree, liability, or any jurisdiction already exercised, and any proceeding instituted or commenced in any Court prior to the commencement of this Act shall, notwithstanding any amendment herein made continue to be heard and decided by such Court

Saving

(2) Where by reason of any amendment herein made in the Indian Limitation Act, 1908, or any other enactment mentioned in column 2 of the Schedule, the period of limitation prescribed for any suit or appeal has been modified, or a different period of limitation will hereafter govern any such suit or appeal, then, notwithstanding any amendment so made or the fact that the suit or appeal would now lie in a different court, the period of limitation applicable to a suit or appeal, as aforesaid in which time has begun to run before the commencement of this Act shall continue to be the period which but for the amendment so made would have been available

Schedule

Serial no	Short title of the Act	Section or Schedule of the Act	Amendment
1	2	3	4
1	The Indian Evidence Act 1872 (Act no I of 1872)	90	The existing section shall be re numbered as section 90(1), and (a) For the words thirty years the words twenty years shall be substituted and (b) The following shall be inserted thereafter as a new sub section (2) (2) Where any such document as is referred to in sub section (1) was registered in accordance with the law relating to registration of documents and a duly certified copy thereof is produced, the Court may presume that the signature and every other part of such document which purports to be in the handwriting of any particular person is in that person's handwriting and in the case of a document executed or attested that it was duly executed and attested by the person by whom it purports to have been executed or attested

Serial no	Short title of the Act	Section or Schedule of the Act	Amendment
1	2	3	4
	The Indian Evidence Act, 1872 (Act no 1 of 1872)		2 After section 90, *add* the following as a new section 90 A '90 A (1) Where any registered document or a duly certified copy thereof or any certified copy of a document which is part of the record of a court of justice is produced from any custody which the court in the particular case considers proper the court may presume that the original was executed by the person by whom it purports to have been executed (2) This presumption shall not be made in respect of any document which is the basis of a suit or of a defence or is relied upon in the plaint or written statement The explanation to sub section (1) of section 90 will also apply to this section
2	The Transfer of Property Act 1882 (Act no IV of 1882)	106	1 The words expiring with the end of a year of the tenancy and expiring with the end of a month of the tenancy shall be omitted 2 For the words fifteen days notice the words thirty days notice shall be substituted
3	The Provincial Small Cause Court Act 1887 (Act no IX of 1887)	The Second Schedule	1 The Articles (8) (26) (34), sub clause (n) of Article (35) and Article (43 A) shall be omitted 2 For the existing Article (38) the following shall be substituted (38) a suit relating to maintenance but not being a suit for recovery of arrears of maintenance based upon a decree or a written agreement '
4	The Bengal Agra and Assam Civil Courts Act 1887 (Act no XII of 1887)	21	In clause (a) of sub section (1) for the words five thousand rupees the words ten thousand rupees shall be substituted
5	The Code of Civil Procedure 1908 (Act no V of 1908)	35 A	1 For the existing sub section (1) the following shall be substituted (1) If in any suit or other proceeding including proceedings in execution but not being an appeal or revision the court finds that the claim or defence or any part thereof is false or vexatious to the knowledge of the party by whom it has been put forward and if such claim or defence or such part is disallowed abandoned or withdrawn in whole or in part the court may after recording its reasons for holding such claim or defence to be false or vexatious make an order for the payment to the successful party of costs by way of compensation irrespective of the decision on other issues in the case

Serial no	Short title of the Act	Section or Schedule of the Act	Amendment
1	2	3	4
	The Code of Civil Procedure 1908 (Act no V of 1908)	42	2 For the existing section the following shall be substituted 42 The Court executing a decree sent to it shall have the same power in executing such decree as the court which passed it All persons disobeying or obstructing the execution of decree shall be punishable by such court in the same manner as if it had passed the decree and its order in executing such decree shall be subject to the same rules in respect of appeal as if the decree had been passed by itself
		47	3 The existing explanation of section 47 shall be re numbered as Explanation I and a second explanation as follows shall be added thereafter *Explanation*—II For the purposes of this section a purchaser at an auction sale in execution of the decree shall be deemed to be a party to the suit in respect of the property purchased by him
		51	4 After clause (*b*) the following shall be added as a new clause (*bb*) (*bb*) by transfer other than sale by attachment or without attachment of the property
		2	5 In sub section (1) after clause (*b*) the following shall be added as a new clause (*bb*) (*bb*) for delivery of possession of any trust property against a person who has ceased to be trustee or has been removed
		102	6 For the words five hundred rupees occurring at the end of the section the words two thousand rupees shall be substituted
		144	7 For sub section (1) the following shall be substituted (1) Where and in so far as a decree or an order is varied or reversed in appeal revision or otherwise the court of first instance shall on the application of any party entitled to any benefit by way of restitution or otherwise cause such restitution to be made as will so far as may be place the parties in the position which they would have occupied but for such decree or order of such part thereof as has been varied or reversed and for this purpose the Court may make any orders including order for the refund of costs and for the payment of interest damages compensation and mesne profits which are properly consequential on such variation or reversal

Serial no	Short title of the Act	Section or Schedule of the Act	Amendment
1	2	3	4
	The Code of Civil Procedure 1908 (Act no V of 1908)	145	5 For the existing section 145 the following shall be substituted 145 Where any person has become liable as surety or given any property as security— (a) for the performance of any decree or any part thereof or (b) for the restitution of any property taken in execution of a decree or (c) for the payment of any money or for the fulfilment of any condition imposed on any person under an order of the Court in any suit or in any proceeding consequent thereon the decree or order may be executed in the manner herein provided for the execution of decrees (i) if he has rendered himself personally liable against him to that extent and (ii) if he has given any property as security by sale of such property to the extent of the security and such person shall for the purposes of appeal be deemed to be a party within the meaning of section 47 Provided that such notice as the Court in each case thinks sufficient has been given to the surety *Explanation*—For the purposes of this section a person entrusted by a Court with custody of any property attached in execution of any decree or order shall be deemed to have become liable as surety for the restitution of such property within the meaning of clause (b)
6	The Indian Limitation Act 1908 (Act no IX of 1908)	The First Schedule	1 In Article 11 for the entry one year under the heading Period of Limitation the words six months shall be substituted 2 In Article 182, for the words 'three years' in the entry under the heading Period of Limitation the words six years , shall be substituted
7	The Indian Lunacy Act 1912 (Act no IV of 1912)	3	In sub section (3) of this section for the colon occurring at the end shall be substituted by a comma and thereafter the following shall be added and includes any other civil court not being the court of a Munsif declared in that behalf and for such areas as may be specified by the State Government by notification in the *Gazette* or
8	The Oudh Laws Act, 1876 Act no (XVIII of 1876)	19	For the last paragraph of this section the following shall be substituted The note as above required may be written and signed by the Judge with his own hand or typed to his dictation in open court and signed by him with his own hand and such note shall form part of the record

Serial no	Short title of the Act	Section or Schedule of the Act	Amendment
1	2	3	4
9	The Provincial Insolvency Act 1920 (Act no V of 1920)	20	1 For the existing section the following shall be substituted 20 The Court when making in order admitting the petition may and where the debtor is a petitioner shall appoint an interim receiver of the property of the debtor and may direct such receiver to take immediate possession thereof and the interim receiver shall thereupon have such of the powers conferable on a receiver appointed under the Code of Civil Procedure 1908 as the court may direct Where in any case an interim receiver is not appointed at the time of admitting the petition the court may make such appointment at any subsequent time before adjudication and the provisions of this section shall apply accordingly *Explanation*—The order appointing an interim receiver may in cases where the debtor is not the petitioner be in respect of either the whole or a part only of the debtor s property
		5 A	2 After sub section (3) the following shall be added as new sub-sections (4) to (7) (4) If on his examination any such person admits that he is indebted to the insolvent the Court or such officer may on the application of the receiver order him to pay to the receiver at such time and in such manner as to the court or to such officer seems expedient the amount in which he is indebted or any part thereof either in full discharge of the whole amount or not as the court or the officer as the case may be thinks fit with or without costs of the examination (5) If on his examination any such person admits that he has in his possession any property belonging to the insolvent the court or such officer may on the application of the receiver order him to deliver to the receiver that property or any part thereof at such time in such manner and on such terms as to the court or to the officer as the case may be may seem just (6) Orders made under sub sections (4) and (5) shall be executed in the same manner as decrees for the payment of money or for the delivery of property under the Code of Civil Procedure 1908 respectively (7) Any person making any payment or delivery in pursuance of an order made under sub-section (4) or sub section (5) shall by such payment or delivery be discharged from all liability whatsoever in respect of such debt or property
		74	3 For the words five hundred rupees the words one thousand rupees shall be substituted

THE U P NURSES, MIDWIVES ASSISTANT MIDWIVES AND HEALTH VISITORS REGISTRATION (AMENDMENT) ACT 1954*

(U P Act No XXV of 1954)

[Authoritative English Text‡ of the Uttar Pradesh Nurses, Midwives, Assistant Midwives and Health Visitors Registration (Sanshodhan) Adhiniyam, 1954]

AN

ACT

U P Act XV of 1934

to amend the U P Nurses, Midwives, Assistant Midwives and Health Visitors Registration Act, 1934 for certain purposes

WHEREAS it is expedient to amend the U P Nurses Midwives, Assistant Midwives and Health Visitors Registration Act, 1934 for the purposes hereinafter appearing

It is hereby enacted in the fifth year of our Republic as follows

Short title and commencement

1 (1) This Act may be called the U P Nurses Midwives Assistant Midwives and Health Visitors Registration (Amendment) Act, 1954.

(2) It shall come into force at once

Amendment of section 10 of U P Act XV of 1934

2 In section 10 of the U P Nurses, Midwives Assistant Midwives and Health Visitors Registration Act 1934 for the full stop at the end of the existing proviso a colon shall be substituted and thereafter the following shall be added as a second proviso

> Provided further that where a member elected under sub clause (ii) or (iii) of clause (*b*) of sub-section (1) of section (4) ceases to be a member of the Uttar Pradesh Legislative Assembly or the Uttar Pradesh Legislative Council as the case may be, he shall cease to be a member of the Council '

*For Statement of Objects and Reasons please *see* U P Gazette (Extraordinary) dated July 28 1954

†Passed in Hindi by the Uttar Pradesh Legislative Assembly on September 7 1954 and the by Uttar Pradesh Legislative Council on September 21 1954

Received the assent of the President on November 22 1954 under Article 201 of the Constitution of India and was published in the Uttar Pradesh Gazette Extraordinary, dated November 30 1954

‡Published in the Uttar Pradesh Gazette Extraordinary, dated November 30 1954

PSUP A P 112 Genl (Leg)—1955—2 970

THE U P CONSOLIDATION OF HOLDINGS (AMENDMENT) ACT 1954

[U P Act no XXVI of 1954]

[*Authoritative English Text of the Uttar Pradesh Jot Chakbandi (Sanshodhan) Adhiniyam* 1954]

AN ACT

U P Act V of 1954

to amend the U P Consolidation of Holdings Act, 1953 for certain purposes

U P Act V of 1954

WHEREAS it is expedient to amend the U P Consolidation of Holdings Act 1953 for the purposes hereinafter appearing

It is hereby enacted as follows

Short title and commencement

1 (1) This Act may be called the U P Consolidation of Holdings (Amendment) Act 1954

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*For Statement of Objects and Reasons please *see* Uttar Pradesh *Gazette Extraordinary* dated March 24 1954

Passed in Hindi by the Uttar Pradesh Legislative Council on August 31 1954 and by the Uttar Pradesh Legislative Assembly on September 23 1954

Received the assent of the President on December 13 1954 under article 201 of the Constitution of India and was published in the *Uttar Pradesh Gazette Extraordinary* dated December 21 1954

†Published in the *Uttar Pradesh Gazette Extraordinary* dated December 21 1954

(2) It shall come into force at once

2 (1) After clause (2) of section 3 of the U P Consolidation of Holdings Act 1953 (hereinafter called the Principal Act) the following shall be added as a new clause (2 A) — Amendment of Section 3 of U P Act V of 1954

(2 A) Consolidation Committee means the Land Management Committee constituted under Section 121 of the U P Zamindari Abolition and Land Reforms Act 1950 and includes a sub committee constituted under Section 43

(2) For the Exception to clause (2) of section 3 of the Principal Act the following shall be substituted

Explanation —In this clause the expression holding shall include lands used or intended to be used for purposes of pasture but does not include land which was grove on the date of the notification issued under section 4 of the Act or to which section 182 of the U P Zamindari Abolition and Land Reforms Act 1950 applies

3 In sub section (2) of section 5 of the Principal Act the comma after the words Settlement Officer (Consolidation) shall be substituted by a full stop and the subsequent words and thereupon all the powers conferred on the Collector Assistant Collector and the Tahsildar under the said Chapter shall so long as that district or the area remains under consolidation operations be exercised respectively by the Settlement Officer (Consolidation) Consolidation Officer and the Assistant Consolidation Officer shall be deleted Amendment of Section 5 of U P Act V of 1954

4 In section 7 of the Principal Act for the words by making a field to field partal of the entire village He shall also prepare a statement showing the words by making a partal in accordance with the procedure to be prescribed He shall also prepare or cause to be prepared a statement showing shall be substituted Amendment of Section 7 of U P Act V of 1954

5 In section 8 of the Principal Act— Amendment of Section 8 of U P Act V of 1954

(1) For the existing sub section (1) the following shall be substituted—

(1) Upon examination of the land records as aforesaid the Assistant Consolidation Officer shall submit a report in the form and manner prescribed to the Settlement Officer (Consolidation) regarding correctness of the existing maps and records and the necessity if any of revision of such maps and records

(2) In sub section (3) for the words provisions contained in Chapter III of the U P Land Revenue Act, 1901 substitute the words Procedure to be prescribed

(3) In sub section (4) for the figure 30 the figure 21 shall be substituted

Amendment of Section 9 of U P Act V of 1954

6 In section 9 of the Principal Act the words and a copy shall be sent to the Collector shall be deleted

Amendment of Section 10 of U P Act V of 1954

7 In section 10 of the Principal Act after the word and figure Section 8 the words and examining the name shall be inserted

Insertion of new Sections 10-A and 10 B in U P Act V of 1954

8 After section 10 of the Principal Act the following shall be added as new sections 10 A and 10 B

Partition of holdings

10 A (1) Subject to such restrictions as may be prescribed a tenure holder entitled to any holding jointly with one or more other tenure holders may at any time after the publication of the notification under section 4 but before publication of the Annual Register under section 9 or of the notification under section 10 as the case may be apply to the Consolidation Officer that his share in the holding be separately allotted to him

(2) Whenever an application is made by any tenure holder under sub section (1) the Consolidation Officer shall notwithstanding anything in section 178 of the U P Zamindari Abolition and Land Reforms Act 1950 treat the tenure holder to be separately entitled to a portion of the holding proportionate to his share therein and proceed accordingly

Amalgamation of holdings

10 B It shall be lawful for any tenure holder entitled to a holding to have the holding amalgamated with the holding of any other tenure holder on such terms as may be agreed upon between them and the Consolidation Officer shall in so far as it may not be inconsistent with the provisions of this Act give effect to it

Amendment of Section 11 of U P Act V of 1954

9 (1) In sub section (1) of section 11 of the Principal Act *after* the word prepare *add* a comma and *insert* the words or cause to be prepared

(2) In sub-clause (v) of clause (*a*) of sub section (1) of section 11 of the Principal Act the words wherever necessary shall be inserted before the words the revenue

Amendment of Section 12 of U P Act V of 1954

10 In section 12 of the Principal Act—

(1) in sub section (4) between the words determination and to the words to the Civil Judge having jurisdiction who shall thereupon refer it shall be inserted and

(2) for the existing sub section (5) the following shall be substituted

(5) Upon the making of reference under sub section (4) all suits or proceedings in the Court of first instance appeal reference or revision in which the question of title in relation to the same land has been raised shall be stayed

Amendment of Section 14 of U P Act V of 1954

11 In sub section (1) of section 14 of the Principal Act in clause (e) the word and at the end shall be deleted and thereafter the following shall be added is a new clause (ee)

(ee) the basis on which the tenure holders will contribute towards land required for purposes of common utility and the extent to which vacant land may be utilised with a view to the said purpose and

Amendment of Section 15 of U P Act V of 1954

12 For section 15 of the Principal Act the following shall be substituted

Principles to be followed in the preparation of the statement of principle

15 (1) The Assistant Consolidation Officer shall in preparing the statement of principles under section 14 have regard to the following principles—

(a) the land in each village is to be divided and grouped in district blocks which will not exceed three in numbers except with the permission of the Director of Consolidation and will be demarcated after taking into account the following factors—

(i) the kind and number of crops grown in the village

(ii) the quality of soil

(iii) the existence or absence of irrigational facilities and

(iv) the presence of land subject to fluvial action of any river

(b) as far as possible only those tenure holders shall get land in any particular block who already hold land therein

(c) the number of *chaks* to be allotted to each tenure holder excluding those earmarked for *abadi* and those reserved for public purposes shall not exceed the number of blocks in the village

(d) the tenure holder belonging to the same family shall as far as possible be given neighbouring *chak*

(e) the location of the residential house of the tenure holder or improvement if any made by him shall as far as possible be taken into account in allotting *chaks*,

(f) small tenure holder shall so far as possible be given land near the village *abadi*

(g) an existing compact holding or farm which is 6½ acres or more in area shall not as far as possible be distributed or divided

(h) every tenure-holder is as far as possible allotted land in the block where he holds the largest part of the holding

(i) the allotment of plots under clause (h) shall be made on the basis of rental value thereof

Provided that the area of the plots proposed to be allotted shall not differ in any case except with the permission of the Assistant Director of Consolidation by more than 20 per cent from the area of the original plots

(2) The Assistant Consolidation Officer shall also have regard to such other principles as may be prescribed or specified by the Consolidation Committee and are not inconsistent with the provisions of this Act and the Rules

Amendment of Section 17 of U P Act V of 1954

13 In sub section (3) of section 17 of the Principal Act for the word shall the word may shall be substituted

Amendment of Section 22 of U P Act V of 1954

14 In section 22 of the Principal Act—

(1) in sub section (1) between the words determination and to the words to the Civil Judge having jurisdiction who shall thereupon refer it shall be inserted and

(2) for existing sub section (2) the following shall be substituted

(2) Upon the making of reference under sub section (1) all suits or proceedings in the Court of first instance appeal reference or revision in which the question of title in relation to the same land has been raised shall be stayed

Amendment of Section 26 of U P Act V of 1954

15 In section 26 of the Principal Act for the words the first day of May next following the words a date to be fixed by the Director of Consolidation subsequent to shall be substituted

Amendment of Section 36 of U P Act V of 1954

16 In section 36 of the Principal Act—

(1) in sub section (1) between the words determination and to the words to the Civil Judge having jurisdiction who shall thereupon refer it shall be inserted and

(2) for sub section (2) the following shall be substituted

(2) Upon making a reference under sub section (1) all suits and proceedings in the Court of first instance appeal reference or revision in which the question of title in relation to same land has been raised shall be stayed

Amendment of Section 42 of U P Act V of 1954

17 In section 42 of the Principal Act after sub section (3) the following shall be inserted as a new sub section (4)

(4) The State Government may by notification in the official *Gazette* empower the Assistant Director of Consolidation to discharge all or such of the functions of the Director of Consolidation as may be specified in the notification and thereupon all references to the Director of Consolidation in this Act shall in respect of the functions so specified will be deemed to include reference to the Assistant Director of Consolidation also

18 In section 15 of the Principal Act – Amendment of Section 43 of U P Act V of 1954

(1) in sub section (1)

(a) *between* the words its members and five or such larger number *add* a sub committee consisting of and

(b) for the words Land Management Committee occurring in the last sentence the words Consolidation Committee shall be substituted

(2) After sub section (2) the following shall be added as sub section (3) –

(3) Where at any time the State Government is satisfied that the Consolidation Committee has refused or failed without reasonable cause or excuse to discharge the duties or perform the functions imposed or assigned by or under this Act or circumstances have so arisen that the Committee has been rendered unable to discharge the duties or perform the functions aforesaid or it is otherwise expedient or necessary to do so it may by notification in the official *Gazette* either reconstitute for purposes of this Act the Consolidation Committee in accordance with the provisions of sub sections (1) and (2) or appoint some other authority to perform the functions or discharge duties of the Consolidation Committee under this Act and thereupon all references to the Consolidation Committee under this Act shall be deemed to include references to the Consolidation Committee so reconstituted or the authority so appointed as the case may be

19 After section 48 of the Principal Act the following shall be inserted as a new section 48 A Inserted of a new Section 48 A in U P Act V of 1954

48-A (1) Notwithstanding anything contained in the foregoing provisions of this Act– Special provisions with respect to evacuee property

(a) no decision of the Custodian of Evacuee Property (hereinafter in this section referred to as the Custodian) in relation to title to any land vested in him as evacuee property under the provisions of the Administration of Evacuee Property Act 1950 shall be called in question and varied or reversed by any officer or authority under this Act and

(b) nothing in this Act shall be construed as requiring the Custodian to stay any proceedings in relation to title to any such land pending before him on the date of the coming into force of those provisions of this Act under which proceedings in relation to title to land are required to be stayed or as empowering the Consolidation

Officer or any other officer or authority to refer for determination of any question of title in relation to such land involved in any proceedings pending before the Custodian on such date

(2) Where as a result of consolidation operations in any village—

(a) lands which are vested as evacuee property in the Custodian under the provisions of the Administration of Evacuee Property Act 1950 are included in holdings which are not vested in the Custodian as evacuee property such lands shall on and from the date of the coming into force of the consolidation scheme cease to be so vested in the Custodian and the provisions of the said Act shall thereupon cease to apply in relation thereto and

(b) in lieu of such lands corresponding lands shall be included in holdings which are vested in the Custodian as evacuee property and such lands shall on and from the date of the coming into force of the consolidation scheme be deemed to be evacuee property declared as such within the meaning of the aforesaid Act and be vested in the Custodian and the provisions of the said Act shall thereupon apply so far as may be in relation to such lands

Deletion of Section 53 of U P Act V of 1954

20 Section 53 of the Principal Act shall be deleted

Amendment of Section 54 of U P Act V of 1954

21 In sub section (2) of section 54 of the Principal Act for the existing clause (x) the following shall be substituted

(x) appointment of Arbitrator

(xx) the procedure for transmission of the question of title to the Civil Judge and of reference by the Civil Judge to Arbitrator under sections 12 22 and 86 and the return of the decision thereon by the Civil Judge to the Consolidation Officer

Substitution of the words Consolidation Committee for Land Management Committee

22 In sections 17 19 and 21 and sub section (2) of section 48 and clause (g) of sub section (2) of section 54 for the words Land Management Committee the words Consolidation Committee shall be substituted

PSUP—A P 121 Genl (Leg)—1955—2 970

THE AGRA UNIVERSITY (AMENDMENT) ACT 1954

[U P Act XXVII of 1954]

[*Authoritative English Text*† *of the Agra University (Sanshodhan) Adhiniyam 1954*]

AN

ACT

U P Act VIII of 1926

U P Act VIII of 1926

(with) to amend the Agra University Act 1926

WHEREAS it is expedient to amend the Agra University Act 1926 for the purposes hereinafter appearing

It is hereby enacted as follows by the Uttar Pradesh Legislature in the fifth year of the Republic of India

Short title and Commencement

1 (1) This Act may be called the Agra University (Amendment) Act 1954

(2) It shall come into force at once

Amendment of section 24 of U P Act VIII of 1926

2 In the proviso to sub section (2) of section 24 of the Agra University Act 1926 (hereinafter referred to as the Principal Act) after the figures 1956 57 the words or if the State Government so directs before the expiry of such subsequent academic year as it may by notification in the official *Gazette* specify from time to time shall be inserted

Amendment of section 40-A of U P Act VIII of 1926

3 In section 40 A of the Principal Act—

(1) in clause (*b*) for the words one year the words eighteen months shall be substituted

(2) in the proviso for the words 12 months the words eighteen months shall be substituted

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*For Statement of Objects and Reasons please *see U P Gazette (Extraordinary)*, dated December 14 1954

Passed in Hindi by the Uttar Pradesh Legislative Council on December 20 1954 and by the Uttar Pradesh Legislative Assembly on December 24 1954

Received the assent of the Governor on December 28 1954 under Article 200 of the Constitution of India and was published in the *Uttar Pradesh Gazette Extraordinary* dated December 29 1954

†Published in the *Uttar Pradesh Gazette Extraordinary* dated December 29 1954

PSUP A P 119 Genl (Leg) 1955—2 970

LUCKNOW UNIVERSITY (AMENDMENT) ORDINANCE 1954

[U P ORDINANCE No III 1954]

(Promulgated in Hindi by the Governor of Uttar Pradesh December 30 1954 under Article 13 (1) of the Constitution of India and published in the U P Gazette Extraordinary dated December 31, 1954)

AN

ORDINANCE

To amend the Lucknow University Act, 1920, for certain purposes

WHEREAS the Governor is satisfied that circumstances exist which render it necessary immediately to amend the Lucknow University Act, 1920, for certain purposes

AND WHEREAS the U P Legislature is not in session,

NOW therefore, in exercise of the powers conferred by clause (1) of Article 213 of the Constitution of India the Governor is pleased to make and promulgate the following Ordinance —

Short title and Commencement

1 (1) This Ordinance may be called the Lucknow University (Amendment) Ordinance, 1954

(2) It shall come into force at once

Amendment of section 10 of U P Act, No V of 1920

2 In section 10 of the Lucknow University Act, 1920 after sub-section (2) the following shall be *added* as a new sub section (3)—

"(3) Where a vacancy other than a temporary vacancy referred to in sub section (2) occurs in the office of Vice Chancellor and the Chancellor is satisfied that it is necessary to make immediate arrangements for carrying on the office he may appoint a Vice-Chancellor for such term not exceeding six months as the Chancellor may fix anything in sub section (1) not withstanding"

PSUP—AP 152 Genl. (Leg)—1955—2970

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